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SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

70-300

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No. ———

NEZ PERCE TRIBE OF INDIANS,
Petitioner.

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Claims

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Statute Involved	2
Question Presented	2
Statement of the Case	2
Reasons for Granting the Writ	6
The Decision Below is Contrary to the Peoria Case	6
The Decision Below Improperly Limits the Commission's Power to Revise Treaties	12
Conclusion	16
Appendices	
A. Opinion Below (1971)	1a
B. Opinion of Indian Claims Commission (1969)	14a
C. Opinion of Court of Claims (1966)	34a
D. Agreement of May 1, 1893	49a

AUTHORITIES CITED

CASES:

Klamath Indians v. United States, 2 Ind.Cl. Comm. 284 (1954)	14
Nez Perce Tribe v. United States (instant case)	App. A, B, C
Otoe and Missouria Indians v. United States, 131 Ct.Cl. 593 (1955)	14
Peoria Tribe v. United States, 390 U.S. 468 (1968), reversing 177 Ct.Cl. 762 (1966)	passim
United States v. Blackfeather, 155 U.S. 180 (1894)	9, 10, 11
Western Cherokee Indians v. United States, 114 Ct.Cl. 716 (1949)	14

ACTS AND TREATIES: Page

Treaty of June 11, 1855, 12 Stat. 957 2
Treaty of June 9, 1863, 14 Stat. 647 3
Agreement of May 1, 1893, ratified 28 Stat. 286 (1894) ..... App. D
Act of August 13, 1946 (Indian Claims Commission Act), 60 Stat. 1049, 25 U.S.C. § 70 ..... passim
Judicial Code, 28 U.S.C. § 1255 2

MISCELLANEOUS:

45 Am.Jur., Reformation of Instruments § 2 (1943) 14
Restatement, *Contracts*, § 481 (1932) 14
H. Rep. 1466, 79th Cong., 1st Sess. (1945) 6

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Petitioner, the Nez Perce Tribe of Indians of Idaho, prays that a writ of certiorari issue to the Court of Claims to review the judgment of the Court entered in the above-entitled case on March 19, 1971.

OPINIONS BELOW

Court of Claims, March 19, 1971, —— Ct.Cl. —— (reprinted below, Appendix A).

Ind. Cls. Comm., November 14, 1969, 22 I.C.C. 53 (reprinted below, Appendix B).

Court of Claims, July 15, 1966, 176 Ct.Cl. 815, cert. den. 386 U.S. 984 (1967) (reprinted below, Appendix C).

Indian Claims Commission, April 7, 1964, 13 I.C.C. 184.

JURISDICTION

The judgment of the Court of Claims was entered on March 19, 1971. Jurisdiction is invoked under Section 20(c) of the Indian Claims Commission Act, 60 Stat. 1049, 25 U.S.C. § 70s(c), and 28 U.S.C. § 1255.

STATUTE INVOLVED

Agreement of May 1, 1893, ratified by Act of August 15, 1894, 28 Stat. 286, 326-332, I Kapp. 536, reprinted as Appendix D.

QUESTION PRESENTED

In 1894 the United States bought certain lands from an Indian tribe for $1,626,222, agreeing to distribute $626,222 to the Indians immediately, and agreeing to hold the balance for the Indians at interest. The Indian Claims Commission, acting under its statutory power to revise Indian treaties to do justice, revised the price to add another $1,387,911, and revised the agreement to pay interest so as to apply to the $1,387,911. The question is whether the Commission had the power to do this.

STATEMENT OF THE CASE

The Nez Perce Indians, formerly one of the powerful tribes of the Northwest, today reside on scattered individual allotments in the northern part of Idaho, near Lewiston. Aboriginally they occupied a vast area in Washington, Idaho and Oregon. The pressure of white settlement led to the first cession in 1855,[1] whereby the Indians ceded some of their land, and kept the rest, about 7,000,000 acres, as a reservation. Gold was discovered on this reservation in 1860, which led to uncontrolled white trespasses, trouble, and eventually another cession

[1] Treaty of June 11, 1855, 12 Stat. 957.

in 1863.[2] This cession reduced the Indians' reservation to 762,000 acres.[3]

Unfortunately for the Indians, their 1863 reservation still contained good lands coveted by the white settlers, and this resulted in the final disappearance of the Nez Perce reservation as a tribally-owned unit. Under the Agreement of 1894,[4] each adult Indian was allowed to select an allotment, and the remainder, some 549,559 acres, was thrown open to white settlement. The Indians were paid $2.97 per acre,[5] or a total of $1,626,222.[6]

Article 3 of the 1894 Agreement provided that out of the money to be paid to the Indians, $626,222 was to be paid to the individual Indians per capita as soon as practicable, and

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[2] Treaty of June 9, 1863, 14 Stat. 647.

[3] This background is detailed in *Nez Perce Tribe* v. *United States*, 3 Ind.Cl.Com. 571 (1955); *Nez Perce Tribe* v. *United States*, 8 Ind. Cl.Com. 220 (1959); and *Nez Perce Tribe* v. *United States*, 13 Ind. Cl.Com. 184 (1964).

[4] Appendix D; 28 Stat. 286, 326-332.

[5] The Agreement called for $3.00 per acre, but the amount actually paid was $2.97.

[6] For background, the Court may be interested in having some idea of what the ceded lands were worth. The ceded lands were about 50% potential farmland, 25% timberland, and 25% grazing land, comprising a virgin island in the middle of a prosperous farming community. Nearby contemporary timber sales averaged over $13 per acre and nearby contemporary range sales averaged over $4. Contemporary farmland sales averaged $29 in the more populous county, adjacent to the reservation in the north, and $14 in the more remote county, adjacent to the reservation in the south. These were improved farms, and so the $29 and $14 should be reduced somewhat to reflect the value of the unimproved lands (the Court of Claims suggested a 25% discount; Appendix C at p. 41a). After the ceded lands themselves came on the market, they averaged $19 per acre for farmland, and $4.66 for rangeland. Farm leases averaged $2.73 per acre per year, and grazing leases 53¢. In light of all this, even the $5.50 awarded by the Commission (which suggests about $7 for the farmland, $6 for the timber, and $2 for the rangeland) seems hardly generous.

> "The remainder of said sum of [$1,626,222] shall be deposited in the Treasury of the United States to the credit of the 'Nes Perces Indians, of Idaho,' *and shall bear interest at the rate of five per centum per annum*, which principal and interest shall be paid to said Indians per capita as follows, to wit: At the expiration of one year from the date of the ratification of this agreement the sum of fifty thousand dollars, and semi-annually thereafter the sum of one hundred and fifty thousand dollars with the interest on the unexpended portion of the fund of one million dollars until the entire amount shall have been paid. . . ." (Emphasis added)[7]

In 1951, pursuant to the Indian Claims Commission Act,[8] the Nez Perce Tribe filed a claim with the Indian Claims Commission. The Indians claimed the true value of the land they ceded was much greater than what they were paid. They alleged fraud, duress, unconscionable consideration, unilateral mistake, and sought to recover "just compensation."[9]

The Indians specifically asked the Commission to allow interest on any award, because of the language of the Agreement, italicized in the quotation above. They referred to the Indian Claims Commission Act, which expressly authorizes the Commission to hear and determine—

> ". . . (3) claims which would result *if the treaties, contracts and agreements* between the claimant and the United States *were revised* on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether in law or fact, or on

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[7] 28 Stat. at 329, Appendix D at p. 52a.

[8] 60 Stat. 1049 (1946), 25 U.S.C. § 70.

[9] Petition, p. 4.

any other ground cognizable by a court of equity; . . ." [10] (Emphasis added.)

The Indians argued that their claim should draw interest because if the Agreement were revised to provide for a fair price for the land, then the interest clause should be revised also so as to apply to the increased consideration.

The first opinion of the Commission (1964) held that a case for unconscionable consideration had not been made out, and consequently, they did not reach the interest claim.

The Indians appealed to the Court of Claims. The Court of Claims handed down its first opinion in 1966, see Appendix C. It intimated that it thought an unconscionable consideration claim had been made out, and remanded for further proceedings. The Court also considered and rejected the interest issue.

A petition for certiorari on the interest question was duly filed in this Court, which was denied. 386 U.S. 984 (1967), No. 1041, O.T. 1966. Since the Government had urged that the petition be denied as premature, the Tribe asked this Court to clarify its denial of certiorari as to the prematurity point. This Court declined to do so. Order of April 24, 1967.

Thereupon the Tribe pursued the case on the remand to the Indian Claims Commission. While the remand proceedings were pending, this Court handed down a decision allowing interest in another Indian claim. *Peoria Tribe* v. *United States*, 390 U.S. 468 (1968).

On November 14, 1969, the Commission issued its second opinion, Appendix B, allowing additional consideration of $1,387,911. The Commission also allowed 5%

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[10] 25 U.S.C. § 70a(3).

simple interest from the date of the Agreement, August 15, 1894, to date of payment,[11] citing the *Peoria* case.

The Government appealed to the Court of Claims on the Commission's method of arriving at the amount of the award, and the allowance of interest thereon. On March 19, 1971, the Court of Claims issued its opinion. Appendix A. It remanded the case to the Commission for additional findings to support its award, and reversed the Commission's decision as to interest.

The Tribe now respectfully petitions this Court to review the Court of Claims' decision denying interest.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Claims is contrary to this Court's decision in the *Peoria* case,[12] in spirit if not in letter, and unless resolved will cause uncertainty in the processing of future Indians claims where treaties of cession provide for interest on undistributed consideration. The decision also establishes an illogical and arbitrary limitation on the power of the Indian Claims Commission to make equitable revisions of treaties of cession, and will cause uncertainty and confusion until corrected.

The Decision Below is Contrary to the Peoria Case

When Congress passed the Indian Claims Commission Act in 1946,[13] it intended to give each Indian tribe of this country a chance to litigate its claims against the United States. Congress was motivated by a desire to do justice, to show tribes that the Government cared about their grievances, and, perhaps, to alleviate the national conscience.[14]

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[11] As of August 15, 1970, the interest would have been 380%, or $5,274,062.

[12] *Peoria Tribe* v. *United States*, 390 U.S. 468 (1968).

[13] 60 Stat. 1049, 25 U.S.C. § 70.

[14] See, e.g., H. Rept. 1466, 79th Cong. 1st Sess. (1945). Congress was also tired of dealing with tribal petitions on a piecemeal basis.

It was an extraordinary piece of legislation, and Congress laid down an extraordinarily liberal standard under which to allow claims; Congress provided that the tribes could recover on claims—

> ". . . which would result if the treaties . . . were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity . . ." 25 U.S.C. § 70a(3).

And in case a tribe could not make out a case on ordinary equitable grounds, it could still recover on—

> ". . . claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity." 25 U.S.C. § 70a(5).

To administer these extraordinarily liberal standards (and to have no other function) Congress established a special tribunal, the Indian Claims Commission. 25 U.S.C. § 70b.

Pursuant to its warrant, the Commission determined that the terms of the Nez Perce Agreement of 1894, whereby those Indians ceded certain land for $1,626,222, were unconscionable, and should be revised to allow a higher price, to wit, $1,387,911 more. In addition, and this is the point in issue, the Commission determined that the Government's agreement to pay 5% interest on the undistributed portion of the $1,626,222 should also apply to the additional consideration of $1,387,911.

The Commission has rarely allowed interest on Indian claims, and did so in this case only because the Government had expressly agreed to pay interest on the undistributed portion of the consideration. The Commission felt that fairness required that that agreement should also apply to the additional consideration found to be due, and that the parties would have so applied the Agreement had they realized that additional consideration was owing. Consequently, the Commission revised

the interest clause to apply to the additional consideration.

At an earlier stage in this case, the Court of Claims had rejected the claim for interest, on the rationale that the 1894 Agreement specified exactly how much the undistributed consideration would be (to wit, $1,000,000), and to say that the parties would probably have agreed to interest on the additional consideration of $1,387,911 was not enough to justify allowing it. Appendix C, p. 48a.

Five months later, in a similar case, the Court of Claims made a similar ruling. *Peoria Tribe* v. *United States*, 177 Ct.Cl. 762 (1966). In that case the Indians ceded land to the United States, but instead of specifying the price, the United States agreed to sell the land at public auction and credit the actual proceeds to the Indians. After the proceeds started coming in, the President and the Indians were to consult to see how much should be distributed to the Indians and how much "invested in safe and profitable stocks, the interest to be annually paid . . ." However, the Government sold most of the land at private sale, which supposedly brought less proceeds than would have a sale at public auction.

In a claim brought under the Indian Claims Commission Act, the Peoria Tribe recovered $172,726 as the difference in value between what they received as a result of the private sale, and what they would have received at public auction. But the Commission refused to allow interest, and the Indians appealed. The Court of Claims likewise refused to allow interest, because the Treaty left the question of the amount to bear interest to the discretion of the Government:

> "In summary, the 1854 treaty clearly specified that the disposition of the proceeds of the land sales was left to the discretion of the President. Therefore, it would be judicial treaty-writing for us to read into that agreement an express promise by the Government to pay interest." 177 Ct.Cl. at 770.

But this reasoning was then reversed by this Court on certiorari.[15] This Court did not hesitate to engage in what the Court of Claims had called "judicial treaty-writing" and to apply the treaty as if there were a firm agreement to pay interest on the additional proceeds not awarded until 1968, and properly so.

This Court cited *United States* v. *Blackfeather*, 155 U.S. 180 (1894), involving the Shawnee Tribe, where the Government likewise agreed to sell Indian lands at public auction and place all proceeds in excess of a certain amount in a fund for the Indians. The Government agreed to pay the Indians an annuity of 5% of the amount in the fund. The Government sold some of the lands at private sale, supposedly realizing less proceeds than at public auction. Congress could have dissolved and paid over the fund to the Indians at any time, and in fact it did so in 1852, twelve years after the lands were sold. The Court held that the annuity promise was the same as an interest promise and allowed 5% interest to date on the entire shortage.

If the Peoria and Shawnee Tribes were entitled to interest, there is no just reason to deny it to the Nez Perce Tribe. The *intent* of the Government to pay interest on the undistributed proceeds of sale was as clear here as there. In the *Peoria* and *Blackfeather* cases this Court construed the treaty to read as if it said, "We will sell the land and hold the proceeds for you at interest, and if a court later rules that we did not give you enough money, we will of course pay interest on that, too." The Nez Perce agreement should be construed in exactly the same way. As noted in *Peoria*, Indian treaties are not to be interpreted narrowly, but—

> ". . . in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people." 390 U.S. at 472-3.

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[15] *Peoria Tribe* v. *United States*, 390 U.S. 468 (1968).

We concede that there are differences between the *Nez Perce*, *Peoria* and *Blackfeather* cases:

1. *Nez Perce* and *Peoria* were brought under the Indian Claims Commission Act, while *Blackfeather* was brought under a special jurisdictional act.

2. *Nez Perce* involved a sale to the United States for resale to settlers, while *Peoria* and *Blackfeather* involved sales directly to the settlers. Accordingly, the consideration happened to be known in advance in *Nez Perce* but not in *Peoria* or *Blackfeather*.

3. *Nez Perce* involved a cession of 550,000 acres, while *Peoria* and *Blackfeather* involved 209,000 and 94,000 acres respectively.

4. The difference between what the Indians received and what they should have received was $1,387,911 in *Nez Perce*, $172,726 in *Peoria*, and $39,042 in *Blackfeather*.

5. In *Nez Perce* the Government did not breach the agreement as written; its wrongdoing took place prior to the agreement. In *Peoria* and *Blackfeather* the Government's wrongdoing took place after the treaties were written.

The similarities would seem to outweigh the differences.

1. In all three cases the Government caused the Indians to give up their lands for the benefit of the settlers, whose interest the Government favored over that of the Indians.

2. In all three cases the Government promised to give the Indians some of the proceeds to spend and promised to invest the rest.

3. In all three cases the Government breached its obligation to see that the Indians were paid a fair price.

4. In all three cases it is reasonably clear (and legally presumable) that if the Government had realized that it

owed more for the land, the excess would have been invested for the Indians.

5. In all three cases the Government for many years had the interest-free use of the additional consideration as if it had been deposited in the Treasury.

6. The policy of liberal construction in favor of the Indians applies to all three groups, and in the *Peoria* and *Nez Perce* cases the favorable policy of the Indian Claims Commission Act applies as well.

In light of these similarities, it cannot equitably or logically be held that the additional consideration due to the Peoria and Blackfeather groups should be put at interest, while that due to the Nez Perce group should not be.

The interest claim cannot be denied on the ground that it was uncertain whether the government would have put the additional consideration in the interest fund, as the Government argued. In the *Peoria* case, the agreement was that as the funds came in from sales of the lands, the parties would agree as to how much would be paid directly to the Indians and how much invested for them. Despite the complete uncertainty as to how much would have been put in the investment fund, this Court held that *all* of the additional consideration would be deemed to have belonged in the investment fund, and would draw interest until 1968.

> "Under Article 7 of the treaty, the United States could at any time pay to the Tribe all or any part of the proceeds received from the sales of the lands at public auction. But until the proceeds were paid over, the United States was obligated to invest them and pay the annual income to the Tribe. The United States was not free merely to hold the proceeds without investing them." 390 U.S. at 471.

And in *Blackfeather*, the agreement was that some of the proceeds would be paid directly to the Indians and some put in a fund at interest. Congress could have paid

the fund over to the Indians at any time and thus terminated the obligation for interest, and in fact it did so in 1852, only twelve years after the land had been sold off. Despite the uncertainty of the continued existence of the interest fund (and its short life in fact), this Court held that the entire additional consideration would be deemed to belong in the interest fund, and to draw interest until paid over to the Indians.

In light of this Court's *Peoria* decision, the Indian Claim Commission applied the same attitude to the instant case, which differs only superficially from the *Peoria* (and *Blackfeather*) facts. So doing, it "revised" the interest clause in the 1894 Agreement to make it apply to the additional consideration awarded under the Indian Claims Commission Act.

The Government appealed to the Court of Claims below, which cancelled the interest award. The Court distinguished *Peoria* on the ground that there the Government broke its treaty in failing to sell the lands at public auction, whereas here the Government complied with the 1894 Agreement as originally written; and because there the interest agreement did not specify the principal amount, whereas here it did. Appendix A, p. 6a. As enumerated above, the distinction is artificial, and the situations are in fact so similar that fairness does not permit different results.

The Decision Below Improperly Limits the Commission's Power to Revise Treaties

The Tribe also argued that revision of treaties was clearly within the Commission's power, and if it could increase the price the Government agreed to pay, a fortiori it could revise the interest clause so as to make it apply to the increased price.

The Court of Claims rejected this argument, on the ground that it was "unable to say with certainty" that had the total consideration originally been $1,387,911

more than it actually was, the Government would have agreed to put any part of it at interest. It declared that at least so far as interest claims were concerned, it could not revise treaties "based on speculation as to what the parties might have done." Appendix A, pp. 7-8a.

The court did not explain why the uncertainty as to what the parties would have agreed would draw interest differed from the uncertainties in the *Peoria* and *Blackfeather* case as to how much the President or Congress would have declared would draw interest. The court simply indicated (p. 8a) that when it comes to an interest question, there can be no revision.

But this frustrates the intent of Congress, which was to give the Indian Claims Commission very broad power to do what is fair on a case-by-case basis. Congress could easily have added a proviso to Clause 3 barring revision so as to allow interest, but it did not do so. That is not to say that interest claims are necessarily allowable (and our case is the only one of its type where the Commission has allowed interest, so far as we are aware), but at least they are entitled to be considered on their merits, the same as any other claim.

Sec. 2(3), 25 U.S.C. § 70a(3) is not clear as to what is meant by the grant of the power to revise treaties, and the cases have not spelled out how much certainty is required as to what the parties would have agreed before a revision can be declared. The word "revised" suggests "reformed," a well known Equity remedy, but reformation is not applicable in this sort of case. In reformation cases, the court does not "reform" what the parties agreed upon; it only reforms the written instrument which fails to reflect what the parties agreed upon. The theory is that the parties came to an understanding, but in reducing it to writing, through fraud, duress, mistake, etc., some provision was omitted or mistakenly inserted,

and Equity will reform the agreement to conform to what the parties actually agreed.[16]

And yet Congress was obviously talking about fraud, duress, mistake, and unconscionable consideration, as unfair acts on the part of the Government which gave the Indians causes of action. Under normal principles of equity, these causes of action lead to rescission,[17] not reformation, since there is no meeting of the minds (assuming there is no error in reducing the agreement to writing), and of course rescission is not a permissible remedy under the Act.

Here we have a case where the Indians were paid an unconscionably small consideration. Sec. 2(3) of the Act allows the Commission to award damages as if the agreement were revised on the ground of unconscionable consideration. Obviously, to give effect to this, it is necessary to conclude that Congress intended the Commission to have the power which even a court of equity lacks—the power to reform an agreement (hypothetically, of course) to make it provide *not* what the parties *actually* intended, *but what the parties would have intended had they both intended to make a fair deal, been aware of the true facts, and in the Indians' case, been capable of acting intelligently in light of those facts.*

It is important that this principle be brought out into the open and recognized, because it means the fact that the United States agreed to pay interest to the Nez Perces

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[16] Restatement, *Contracts* § 491 (1932); 45 Am.Jur., *Reformation of Instruments* § 2 (1943). It is not clear that this limitation on reformation was understood in *Otoe and Missouria Indians* v. *United States*, 131 Ct. Cl. 593, 599 (1955) and *Western Cherokee Indians* v. *United States*, 114 Ct. Cl. 716, 720 (1949) (e.g., reformation does not lie for unconscionable consideration, which always goes to the inducement, not to the reduction to writing). Prior to the Indian Claims Commission Act, of course, this Court had no power to reform a treaty. *Western Cherokee*, above, 114 Ct. Cl. at 720-721.

[17] *Klamath Indians* v. *United States*, 2 Ind.Cl.Comm. 284, 287 (1954).

only on exactly $1 million does not end the inquiry. Under the Act, the Commission had a duty to consider whether that agreement to pay interest should be revised on the basis of what the parties intending to make a fair deal *would have* intended had they agreed to a consideration of $3,022,575 instead of $1,626,222. That is what the Commission did, but the Court of Claims reversed, indicating that the revision power does not apply to interest clauses. The court cited no legislative history in support of this conclusion, nor could it have.

Granted, the Commission, and those who review the Commission, should approach its task with an awareness of the general policy against interest against the sovereign, and of the large amounts at stake in Indian claims. If the United States had not agreed to pay any interest at all, the Indians no doubt would have no case. The Commission would be understandably reluctant to write a brand new interest clause into the agreement, and has never done so. But since the United States *did* agree to interest here, did agree in principle, in other words, then the case for revision is surely within the *Peoria* rationale and the intent of the Act.

CONCLUSION

When an Agreement expressly provides for interest on the stated consideration, and the Agreement has been revised to increase the consideration, as here, it is artificial, and certainly not in harmony with the purposes of the Indian Claims Commission Act and the spirit of *Peoria*, to say that the Commission is not permitted to revise the interest clause as well. Certiorari should be granted, and the judgment of the Court of Claims reversed.

Respectfully submitted,

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June 17, 1971



APPENDIX A

OPINION BELOW

IN THE UNITED STATES COURT OF CLAIMS

Appeal No. 2-70

(Decided March 19, 1971)

THE UNITED STATES

v.

THE NEZ PERCE TRIBE OF INDIANS

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON, and NICHOLS, *Judges*.

ON APPEAL FROM THE INDIAN CLAIMS COMMISSION

LARAMORE, *Judge*, delivered the opinion of the court:

This case comes before us on a second appeal, this time by defendant, from a decision of the Indian Claims Commission.[1] The Commission found, after remand (which is discussed later), (1) that the average value of plaintiff's (hereinafter referred to as the Tribe) land was $5.50 per acre; (2) that the difference between such value and what was actually paid ($2.97) was so gross as to be unconscionable; and (3) that, therefore, pursuant to clause (3) of 25 U.S.C. § 70a (1964)[2] the Tribe is entitled to re-

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[1] 22 Ind. Cl. Comm. 53 (Nov. 14, 1969).

[2] Clause (3) of section 2 of the Indian Claim Commission Act, 60 Stat. 1049, 1050 (1946) provides, as follows:

[Footnote continued on page 2a]

cover additional consideration in the principal amount of $1,387,911. The Commission also found that the Tribe was entitled to recover interest on the aforementioned principal amount at the rate of five percent per annum from August 15, 1894, the date the lands were originally ceded by the Tribe to the defendant. The defendant appeals not only the question last noted involving interest but also appeals the Commission's method of determining that the ceded land had a fair market value of $5.50 per acre. Furthermore, the defendant questions the validity of our remand of the case to the Commission after the case was first heard by this court. There is no cross-appeal by the Tribe.

The history of this case shows that the initial decision by the Commission, 13 Ind. Cl. Comm. 184 (1964), found the fair market value of the ceded land [3] to be $4.00 per acre and the discrepancy between such value and the price originally paid not to be so gross as to be unconscionable and, therefore, the Tribe could not recover under the Act. Following that decision, the Tribe appealed to this court. *Nez Perce Tribe of Indians* v. *United States*, 176 Ct. Cl. 815 (1966), *cert. denied*, 386 U.S. 984 (1967).

On said appeal by the Tribe we concluded that the case should be remanded to the Commission pursuant to 25 U.S.C. § 70s(b). We pointed out in our decision, *supra*, that it was the considered opinion of the court that after reviewing the record it was possible that the lands in question had a fair market value greater than $4.00 per acre.

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[2] [Continued]

"The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe * * *: (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, [or] unconscionable consideration * * *."

[3] The original reservation consisted of approximately 762,000 acres. After the individual Indians were given first choice and the Tribe received trust funds there remained 549,559 acres which were ceded to the government.

The specifics of that determination will be discussed below.[4] We also decided that even if the Commission had found in favor of the Tribe on the unconscionability of consideration issue, the Tribe still could not recover interest on any additional amount awarded them. Our reasons for that holding are set forth not only at 176 Ct. Cl. 817, 829-830, *supra*, but we shall also set forth again those reasons hereafter.

We shall now deal with the case for the second time and do so in relation to those points raised on appeal by the defendant as noted earlier. In addition, we shall discuss a question concerning a portion of the original amount paid which was not heretofore dealt with in particular. In the end we will again remand the case to the Indian Claims Commission.

I. *The Question of Interest*

As noted above, the Indian Claims Commission, in their second opinion, awarded the Tribe interest on the principal recovery at five percent per annum from the date of ratification of the original agreement, August 15, 1894, to the date of payment.[5] This amounts to $5,222,015.14 since computation is based upon the additional recovery of $1,387,911, over and above the amount originally paid, $1,626,222. From the opinion of the Commission, 22 Ind. Cl. Comm. 53, *supra*, it appears that the decision to award the additional interest was based on a combination of several factors. One of those factors is the Commission's interpretation of that portion of the original agreement wherein the government agreed to pay interest on the monies due the Tribe.

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[4] In our first opinion we also considered the fairness of the dealings pursuant to section 2, clause (5) of the Indian Clause Commission Act, 60 Stat. 1049. Neither party having appealed our decision as to that issue, we did not consider it on this appeal.

[5] The original agreement of May 1, 1893 was ratified and approved by section 16 of the Act of August 15, 1894, 28 Stat. 286, 326.

That original agreement noted above provided, in addition to the total consideration to be paid, that the government would also pay interest on the amount which remained on deposit at the Treasury after the initial principal payment of $626,222. Because this agreement is significant in relation to the interest on the additional sum found to be due the Tribe by the Commission, we shall quote that part which specified the interest payment:

> * * * the sum of six hundred and twenty-six thousand two hundred and twenty-two dollars shall be paid to said Indians per capita as soon as practicable after the ratification of this agreement. The remainder of said sum of one million six hundred and twenty-six thousand two hundred and twenty-two dollars shall be deposited in the Treasury of the United States to the credit of the "Nes Perces Indians, of Idaho," and shall bear interest at the rate of five per centum per annum, which principal and interest shall be paid to said Indians per capita as follows, to wit: * * *.

It is from this part of the original agreement together with the Commission's interpretation of the Supreme Court's decision in *The Peoria Tribe of Oklahoma, et al.* v. *United States*, 390 U.S. 468 (1968), *r'vg*, 177 Ct. Cl. 762, 369 F. 2d 1001 (1966), that we feel the Commission decided the Tribe in this case is entitled to interest. With this decision we cannot agree.

The Commission below acknowledged that we dealt adversely with the interest question in our first opinion but felt that the *Peoria* case, *supra*, which was decided after our first *Nez Perce* case, *supra*, provided a basis upon which interest could be awarded notwithstanding what was called "judicial dictum" to the contrary.[6]

In *Peoria*, the Supreme Court reversed our earlier opinion (177 Ct. Cl. 762, 369 F. 2d 1001 (1966)) wherein we

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[6] *See*, 22 Ind. Cl. Comm. 53, 66 (1969).

concluded that the Peoria Tribe was not entitled to interest on the amount awarded in addition to that amount provided by the Treaty of May 30, 1854, 10 Stat. 1082. The details of that decision can be found at the above-noted citation (390 U.S. 468). The pertinent facts in relation to this case are that in the case of the Peoria Tribe a *treaty* originally provided that the lands taken should be sold at auction and the proceeds turned over to the Tribe. (Art. 4, Treaty of May 30, 1854, 10 Stat. 1082.) Article 7 of the same treaty also provided that if any amounts were not paid over to the Peoria Tribe, those amounts would be invested for the benefit of the Peoria Tribe and the interest paid annually.

Notwithstanding the provisions of the above-noted Treaty of 1854, the government sold most of the lands at private sale which brought lower prices than could have been received if the sales were by auction. Therefore, both the Indian Claims Commission, at 15 Ind. Cl. Comm. 123 (1965), and this court, 177 Ct. Cl. 762, *supra*, found that the Peoria Tribe was entitled to recover money damages for a breach of the obligation to sell at public auction. It was also decided by this court, Judges Durfee and Davis dissenting, that the Peoria Tribe was *not* entitled to recover interest on the recovery. To this latter decision the Tribe sought a *writ of certiorari*, and the same was granted.

The Supreme Court decided, 390 U.S. 468, 473, *supra*, that both the Indian Claims Commission, and this court, erred in not awarding additional damages for the government's "failure to invest the proceeds that would have been received had the United States not violated the treaty * * *." The Court went on to intimate that these additional damages could be computed by using the rate of interest applicable for the period in question. (*See*, 390 U.S. 468, at n.6.) Because of the differences noted above and explained below, we are of the opinion that the decision by the Supreme Court in *Peoria* in no way provides a basis upon which interest may be granted here.

The *Peoria* case is first distinguished by the fact that here we are dealing with an unconscionable consideration case, whereas the *Peoria* case involved a breach of a specific treaty. In *Peoria* there was a breach of the specific obligation to sell the lands of the Peoria Tribe at public auction and damages were awarded for that breach, while here there was no such breach of a treaty. In this case we are not concerned with *damages* for a specific breach and, therefore, the primary basis upon which interest (or damages, depending upon the interpretation of the Supreme Court's opinion in *Peoria*) was awarded in *Peoria* does not exist in this case.

The second and more significant difference is in the specific agreements to pay interest. Contrast the following *Article 7* of the Treaty of 1854 which granted the Peoria Tribe interest with *Article 3* of the Act of August 15, 1894, quoted earlier in reference to the Nez Perce Tribe:

> And as the amount of the annual receipts from the sales of their lands, cannot now be ascertained, it is agreed that the President may, from time to time, and upon consultation with said Indians, determine how much of the net proceeds of said sales shall be paid them, and how much shall be invested in safe and profitable stocks, the interest to be annually paid to them, or expended for their benefit and improvement.

By comparison it becomes clear to us that the provision for interest in the case of the Peoria treaty was of a nature that could support a decision to pay interest on any additional sum awarded, while the provision in point as to the Nez Perce Tribe was not so loosely worded as to tolerate interest being paid on any more than the original amount contained in the agreement. In other words, the government in the *Nez Perce* case did all it promised; *i.e.*, the agreement was not an open-ended transaction and it was fully complied with.

In conclusion, we get no help from the *Peoria* case for a conclusion that interest may be granted in this case.

Furthermore, we feel that the differences in the two cases, especially concerning the agreements to pay interest, and the basis upon which damages were awarded in *Peoria*, all distinguish our case from *Peoria*. We shall, therefore, move on to a discussion of the alternative argument made in favor of awarding interest.

The Tribe has argued that since the Indian Claims Commission awarded additional consideration in this case it is inconsistent not to also award additional interest. Stated somewhat differently, the Tribe argues that since the Indian Claims Commission has the power to revise treaties, contracts, and agreements (clause 3, of section 2, Act of August 13, 1946, 60 Stat. 1049 (Indian Claims Commission Act)) that, therefore, the Commission must also have the power to revise that portion of an agreement which grants interest. The Tribe pursues this approach by asserting that the Commission so revised the agreement in question and that revision is completely within its power.

In response to the aforementioned argument, we must first refer to our earlier opinion, 176 Ct. Cl. 815 at 829-830, where we discussed the interest question. As we stated previously, we are unable to say with certainty that had the total consideration originally been $3,022,575 instead of $1,626,222, the government would have agreed to put more than one million dollars into the interest earning account. Furthermore, even if we were inclined to agree that this result most logically would have followed from the larger amount, we are unable to support a judgment for interest on that type of reasoning. While it may be consistent to raise the total interest payment in accordance with the increase in the principal consideration, it is without a clear manifestation of intent by the government to pay interest, and without such we cannot act. 28 U.S.C. § 2516(a) (1964). We admit that this position may be classified as a strict approach but in view of previous experiences we feel this is our only alternative. *United States* v. *Thayer-West Point Hotel*, 329 U.S. 585

(1947), *r'vg in part*, 106 Ct. Cl. 60, 64 F. Supp. 565 (1946); *Confederated Salish & Kootenai Tribes* v. *United States*, 175 Ct. Cl. 451, *cert. denied*, 385 U.S. 921 (1966); *United States* v. *Omaha Tribe of Indians*, 253 U.S. 275 (1920), aff'g *in part*, 53 Ct. Cl. 549 (1918).

In conclusion on this point we must note that it is our opinion that whereas the Indian Claims Commission Act, 60 Stat. 1049, section 2, clause 3 (25 U.S.C. § 70a) allows for additional consideration when one of the enumerated grounds is found to exist, it does not allow, as the Tribe would have us hold, the Commission to *rewrite* the agreement so as to provide for additional interest. The section in question reads as follows:

> (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; * * *. [25 U.S.C. § 70a]

In our opinion, Congress did not intend by the formulation of the above provision to give the Commission the broad power advocated by the Tribe in this case. *See, The Loyal Band of Creek Indians* v. *United States*, 118 Ct. Cl. 373, 383, 97 F. Supp. 426, *cert. denied*, 342 U.S. 813 (1951); *The Osage Nation of Indians* v. *United States*, 119 Ct. Cl. 592, 671, 97 F. Supp. 381, *cert, denied*, 342 U.S. 896 (1951). We must, therefore, stand firm in our conclusion that in order to award interest there must be express authority for doing so either by a written agreement or an act of Congress (28 U.S.C. § 2516(a)), and such authority does not include a hypothetical revision of an agreement which is based upon speculation as to what the parties might have done.

II. *Damages for Trespass*

Counsel for the Tribe, during oral argument, brought the court's attention to one facet of the case to which neither the Commission nor this court has previously addressed itself. That point is in reference to a portion of the original amount paid to the Tribe and specifically refers to $.50 per acre which was paid for all previous trespasses by the whites upon the lands of the Nez Perce Tribe.

The original brief filed on behalf of the Tribe dealt generally with the question of consideration paid and whether or not the discrepancy between the amount paid and the true fair market value was so gross as to be unconscionable. In that overall presentation the court's attention was directed to the argument that because $.50 per acre of the total amount paid was paid for trespasses and not as consideration for the sale of land, that this fact increased the aforementioned discrepancy. On the present appeal the brief for the Tribe now carries the above argument one step further; the position now advocated for the first time is that the $.50 per acre paid as damages for trespass should not be included in the amount deducted from the final award as determined by the Indian Claims Commission. This position would call for an increase in the total award granted to the Tribe of approximately $274,780. This result is computed by starting with the fair market value for the ceded lands as finally determined using the $5.50 figure (549,559 acres times $5.50 equals $3,022,575). From this figure the Commission deducted the amount originally paid ($1,634,664) to arrive at the total difference of $1,387,911 which is the additional sum found to be due the Tribe. The increase to which the Tribe refers results by reducing the $1,634,664 (amount originally paid) by $274,780; when the resulting figure ($1,359,884) is subtracted from the total amount found to be due the Tribe ($3,022,575) the new award would be $1,662,691. However, for the following reasons we do not

decide the correctness or incorrectness of the Tribe's position.

As stated earlier, the original position of the Tribe was that this $.50 difference contributed to the discrepancy between the actual fair market value and the amount paid as consideration for the ceded lands. This argument strengthened the Tribe's position as to the unconscionability of the difference as determined at the first hearing before the Indian Claims Commission. It was not illogical, therefore, that the Tribe included the damages argument in its brief to this court following the first decision of the Indian Claims Commission. Subsequently, we decided that the Commission should reconsider their determination as to fair market value (176 Ct. Cl. 815, *supra*). However, prior to the second hearing by the Commission pursuant to our remand, the Tribe asked this court to reconsider our first decision. That motion for rehearing, filed September 16, 1966, did not mention the above damages argument in any form. Thereafter the Tribe pursued their case to the Commission.

Having finally convinced the Commission at the second hearing that the lands were worth more than the $4.00 figure originally arrived at, and that they were entitled to recover an additional sum, the Tribe then became the appellee in this court. In their brief to this court as appellee the Tribe once again raised the damages issue. This time, however, it included a new plea that the $.50 per acre should not be included when deducting the amount originally paid from the amount finally determined to be due the Tribe. This new approach was included even though the Commission, in its second decision, did not discuss the $.50 per acre question. Furthermore, as stated earlier, the Tribe did not cross-appeal on this aspect of the case.

It is, therefore, the opinion of this court that only after the total consideration was increased did plaintiffs restructure argument concerning the damages for trespass

and at that point it was much too late. Consequently, we are of the opinion that the Tribe, having raised this argument in its present form only after the second opinion of the Indian Claims Commission from which they do not appeal, did not make a timely claim and are, therefore, not entitled to recover on this issue. *McCauley ex rel. Kaw Tribe of Indians* v. *United States*, 125 Ct. Cl. 628, 113 F. Supp. 689 (1953); *Snake or Piute Indians of Former Malheur Reservation in Oregon* v. *United States*, 125 Ct. Cl. 241; 112 F. Supp. 543 (1953); *Saginaw Broadcasting Co.* v. *Federal Communications Commission*, 96 F. 2d 554 (1938), *cert. denied*, 305 U.S. 613 (1938).

III. *The Indian Claims Commission's Determination of Fair Market Value*

As was noted at the onset of this opinion, we are now reviewing this case for the second time. Our initial review (176 Ct. Cl. 815) concluded that the case should be remanded to the Commission because we felt, after considering all the facts, that the initial figure of $4.00 per acre as the maximum fair market value was not supported by substantial evidence. We did not say that the $4.00 per acre determination was totally unsupportable, but, as we stated in our first opinion, such valuation seemed to us to be merely at the threshold of the actual value and, therefore, not supportable as the most realistic amount:

> * * * We are of the view that there is substantial evidence in the record indicating a value of $4 per acre, but unlike the Commission, we think this is a minimum figure. [176 Ct. Cl. 815, 819]
>
> To reiterate, we think that the $4 per acre figure is supported by substantial evidence. It is, however, at the threshold, and not at the ceiling as the Commission determined. We think the overwhelming weight of the evidence shows that the Commission should have found the $4 figure to be the minimum. [176 Ct. Cl. 815, 825-826]

> * * * That is to say, we believe that no reasonable seller in a willing transaction under any circumstances would have parted with ownership of the ceded area for less than $4 per acre. So on the facts of this case, the "legitimate" margin is not between $2.97 and $4, but between $4 and something greater. [176 Ct. Cl. 815, 829]

As a consequence of our determination as to the $4 maximum value being unsupportable, we remanded the case to the Commission with instructions to reconsider the evidence as presented and look to "some higher, unstated value in resolving the 'unconscionable consideration' issue." (176 Ct. Cl. 815 at 828.) We do feel that pursuant to this remand the Commission was not compelled to find a higher value and could have resolved any difficulties we may have had with their initial conclusion by restating that the $4 figure was not only the minimum but also the maximum that could be found. Nevertheless, the Commission did not stand by its initial finding but instead it chose to increase the average fair market value to $5.50 per acre. In so doing, the Commission gave us no indication by way of findings as to how they arrived at this new figure. (The Commission merely changed the figure from $4 to $5.50.) Because of this gap we must again remand the case.

It should be pointed out that as of now we have no quarrel with this new amount arrived at by the Commission; in fact, we feel that this is probably much more realistic than the initial finding. However, it is our function to review the decisions of the Commission (25 U.S.C. § 70s) and we can do this only by the standards set forth in the statute granting us the power to review. (Indian Claims Commission Act, *supra.*) That statute tells us we should review the findings to determine if the ultimate conclusion is supported by substantial evidence. Thus, when we have only an ultimate conclusion, without the aid of specific findings or reasons which lead up to that conclusion, we are powerless to determine whether that

conclusion is supported by substantial evidence. *Snake or Piute Indians of Former Malheur Reservation in Oregon* v. *United States*, 125 Ct. Cl. 241, 112 F. Supp. 543 (1953).

Counsel for the Tribe explains that the Commission arrived at this conclusion after considering all the evidence previously presented and then making a so-called "jury verdict" or "intuitive leap." This "leap" occurred after reconsidering all the evidence presented on the first hearing which is the same evidence used by the Commission to make the initial determination of $4 per acre. It is entirely possible and quite conceivable that such findings alone could support the new value as determined by the Commission. However, we do believe that when Congress directed that reasons be given for the findings and conclusions (25 U.S.C. § 70r(3)) it contemplated a more detailed and specific display of analysis than what we have in the second determination of fair market value by the Indian Claims Commission.

Accordingly, the decisison of the Indian Claims Commission is reversed as to the interest question, and the case is remanded for further proceedings in conformity with this opinion; *i.e.*, to supply specific findings with respect to the $5.50 figure.

Reversed and remanded.

APPENDIX B

22 Ind. Cl. Comm. 53

BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 175-B

THE NEZ PERCE TRIBE OF INDIANS,
Plaintiff,

v.

THE UNITED STATES OF AMERICA,
Defendant.

Decided: November 14, 1969

OPINION OF THE COMMISSION

Commissioner Pierce delivered the opinion of the Commission.

This claim of the Nez Perce Tribe of Indians of Idaho involves the tribe's reservation lands in northern Idaho, a part of which reservation it ceded to the United States by the Agreement of May 1, 1893, approved August 15, 1894 (28 Stat. 286, 326-332, 1 Kappler 536). Of the original reservation of some 762,000 acres, individual Indians were given first choice through allotment provisions of 180,657 acres, and the tribe received trust lands. There remained 549,559 acres which were ceded to the United States for a consideration averaging $2.97 per acre. The plaintiff claimed additional compensation.

On April 7, 1964, the Commission determined that the ceded land had a value in 1894 of $4.00 per acre, that the discrepancy between such value and the price agreed upon and paid to plaintiff was not so gross as to be unconscion-

able, and that the plaintiff was therefore not entitled to recover under that proviso of section 2(3) of the Indian Claims Commission Act. The Commission further held that plaintiff had not established a right to recover on the grounds of fraud, duress or lack of fair and honorable dealings. 13 Ind. Cl. Comm. 184. Inasmuch as the Commission determined that the petition should be dismissed, it did not discuss or rule on plaintiff's claim for interest.

The plaintiff appealed the above decision to the Court of Claims which agreed that plaintiff had not established a right to recover on the grounds of fraud, duress or lack of fair and honorable dealings on the part of the United States, but disagreed with the Commission's view of the law of unconscionable consideration as applied to the facts and circumstances of this case, reversing and remanding the case for further proceedings. 176 Ct. Cl. 815 (1966), *cert. denied* 386 U. S. 984 (1967). After examining the evidence relating to the 1894 fair market value of the ceded lands, the Court concluded that the $4.00 per acre value found by the Commission was the bare minimum figure which the record could support and was not necessarily the appropriate figure nor the sole criterion to look to in resolving the unconscionable consideration issue. The Court then outlined certain additional factors which it felt should be considered in determining whether the consideration agreed to and paid was unconscionable. The Court stated that while it was not remanding the case with "express instructions to find a higher value, we do feel that it is appropriate to look to some higher unstated value in resolving the 'unconscionable consideration' issue". 176 Ct. Cl. 826.

In view of the Court's opinion we find no reason for revising or supplementing any of the basic or evidentiary findings previously entered.[1] We must, of course, vacate

[1] The parties have made certain other arguments in their briefs on remand which we have considered but which we do not deem necessary or desirable to discuss in detail in this opinion. The

the ultimate findings concerning the right of plaintiff to recover on its claim. We have also reconsidered the Commission's determinations concerning the fair market value of the subject area in 1894.

As the Court of Claims stated, the Commission's previous finding of fair market value was a bare minimum at the "threshold" of value. We cannot permit such a valuation to stand as the measure of damages for which an Indian tribe will recover on its claim before this Commission. Clearly it is not right to fix fair market value at the least permissible figure. While we do not mean to intimate that Indian claimants are entitled to a maximum figure, we must in all fairness and justice revise the valuation figure to seek the middle ground of the permissible range. It is well recognized that determinations of fair market value cannot be the subject of precise, mathematical computations. As the Court of Claims observed in this case, "Property appraisal is an inexact science at best; this is particularly so when the valuation date is 70 years distant from the appraisal date." 176 Ct. Cl. at 825. The term "fair market value" in this instance really involves a range of value within which the evidence will support a determination of a dollars and cents valuation. We must seek the middle area of this value spectrum—neither the minimum nor the maximum.

Accordingly, we have carefully considered the Court of Claims' opinion and we have reviewed all of the various

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plaintiff argues, for example, the correctness of the Court of Claims' application of a "discount for remoteness". Actually this discount was for "remoteness and inaccessibility". 176 Ct. Cl. at 825. These factors have been discussed in detail in the Commission's original decision and, we are confident, were carefully considered by the Court in reviewing the decision and the parties' contentions on appeal. The defendant argues that the Court failed to consider the questionable Van Valkenburg timber sale. This matter was likewise dealt with in the original Commission decision. We have noted all of the arguments presented on the remand before us. And we have noted too the fact that the Court's $5.00 to $7.00, figure resulted from an application of discount factors upon the plaintiff's agricultural sales data and not on the overall average sales figure.

factors referred to in the Commission's opinion and the findings previously entered. Weighing all of this material in the light of the Court of Claims' reasoning in this case, we have concluded that the fair market value of the subject area, as of August 15, 1894, was $3,022,575.00, or an average per acre value of approximately $5.50.

Since the consideration paid by the defendant for the cession was $1,634,664.00 this would leave a difference of $1,387,911.00 in the fair market value of the subject area and the amount paid for the cession. The lands were, therefore, worth about 80% more than the consideration which was paid the plaintiff. This discrepancy, considered with all of the circumstances involved in this case, has led the Commission to conclude that the consideration paid the plaintiff for the cession of its lands was so grossly inadequate as to make that consideration unconscionable. Accordingly, the plaintiff is entitled to recover under the provisions of clause (3), Section 2 of the Indian Claims Commission Act. The amount of the recovery is $1,387,911.00.

The plaintiff contends that it is entitled to interest on this amount. The right to interest, it is asserted, was granted by Article 3 of the 1894 agreement, which article reads as follows:

> In consideration for the lands ceded, sold, relinquished, and conveyed as aforesaid the United States stipulates and agrees to pay to the said Nez Perce Indians the sum of one million six hundred and twenty-six thousand two hundred and twenty-two dollars, of which amount the sum of six hundred and twenty-six thousand two hundred and twenty-two dollars shall be paid to said Indians per capita as soon as practicable after the ratification of this agreement. The *remainder of said sum* of one million six hundred and twenty-six thousand two hundred and twenty-two dollars *shall be deposited in the Treasury* of the United States to the credit of the "Nes Perces Indians, of Idaho," and *shall bear interest at the rate*

> *of five per centum per annum, which principal and interest shall be paid to said Indians per capita as follows, to wit:* At the expiration of one year from the date of the ratification of this agreement the sum of fifty thousand dollars, and semi-annually thereafter the sum of one hundred and fifty thousand dollars with the interest on the unexpended portion of the fund of one million dollars until the entire amount shall have been paid, and no part of the funds to be derived from the cession of lands by this agreement made shall be diverted or withheld from the disposition made by this article on account of any depredation or other act committed by any Nez Perce Indian, prior to the execution of this agreement, but the same shall be actually paid to the Indians in cash, in the manner and at the times as herein stipulated. (28 Stat. 286, 329-330) [Italics supplied]

It is plaintiff's position that if the 1894 agreement were treated as "revised" pursuant to Section 2(3) of the Indian Claims Commission Act, i.e., for unconscionable consideration, to provide for the payment of a sum representing the fair market value of the lands ceded instead of the unconscionably low amount named in the agreement, then the "remainder" which the agreement required be placed in the Treasury of the United States to bear interest at the rate of 5% per annum, would have included the additional amount which we are awarding in this case, i.e., the difference between the unconscionably low amount agreed to and paid and the fair market value of the land at the time of cession. In addition to the language of Article 3 of the agreement, plaintiff relies on the decision of the United States Supreme Court in *Peoria Tribe of Indians of Oklahoma, et al.*, v. *United States*, 390 U. S. 468 (April 1, 1968) reversing the decision of the Court of Claims affirming this Commission's denial of interest in the *Peoria* case under Article 7 of the Peoria Treaty of May 30, 1854 (10 Stat. 1082), which Article 7 plaintiff herein contends is sufficiently similar to Article 3 of the Nez Perce agreement to warrant the same result. *Peoria*

Tribe of Indians of Oklahoma, et al. v. *United States*, 15 Ind. Cl. Comm. 123 (1965), aff'd 177 Ct. Cl. 815 (1966). Plaintiff also relies on the decisions of the Supreme Court in *United States* v. *Blackfeather*, 155 U. S. 180 (1894), and on *Menominee Tribe* v. *United States*, 107 Ct. Cl. 23 (1946). Defendant relies entirely upon the decision of the Court of Claims rendered on the appeal of this case to the Court of Claims in which the Court expressed the opinion that the Nez Perce were not entitled to interest on any award which the Commission might make on the agreement as revised for unconscionable consideration pointing out that Article 3 of the agreement specified the precise sum which would bear interest, that is, $1,000,000, and that such sum apparently was paid to the Indians and did bear interest as provided in the agreement.

The issue of interest in this case is in a somewhat peculiar posture because of the sequence of events. The Indian Claims Commission rendered its decision in the *Nez Perce* case, dismissing the petition for failure to establish a claim under the unconscionable consideration clause of the Act on April 7, 1964, 13 Ind. Cl. Comm. 283, and did not make any ruling on plaintiff's claim to interest on an award. Approximately a year later in March of 1965, the Commission rendered its opinion in the *Peoria* case, 15 Ind. Cl. Comm. 123, in which it ruled that the plaintiff therein was entitled to a judgment because defendant had violated its treaty obligation to sell plaintiff's land at public auction to the highest bidder by selling the land at private sales for less than it could have obtained at public auction, and plaintiff was awarded the difference between the amount received by defendant and paid to plaintiff and the amount plaintiff would have received if defendant had complied with the treaty. However, the Commission denied plaintiff's claim for interest holding that Article 7 of the Peoria treaty did not amount to an agreement by the United States to pay interest nor did it authorize the

Commission to award interest.[2] In the meantime the plaintiff in the *Nez Perce* case had appealed the dismissal of its case to the Court of Claims, and on July 15, 1966, the Court of Claims reversed the decisison of the Indian Claims Commission (176 Ct. Cl. 815) insofar as it denied recovery to the plaintiff for unconscionable consideration under Section 2(3) of the Indian Claims Commission Act and remanded the case to the Commission to reconsider what conscionable consideration or the fair market value of the land would be since, in the opinion of the Court, the $4.00 per acre which the Commission had found the land to have been worth was only the bare minimum supported by the record. The Court agreed with the Commission that plaintiff had not established a claim under Section 2(5) of the Indian Claims Commission Act, i.e., lack of fair and honorable dealings. In reaching its conclusion that the consideration paid the Nez Perce Indians was probably unconscionable, the Court of Claims noted that after the payment of the stated amount per capita provided for in Article 3 of the Nez Perce agreement, the larger sum which would have resulted if a conscionable consideration had been agreed to and would therefore have

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[2] Article 7 of the Peoria treaty provides as follows:

ARTICLE 7. The annual payments provided for in article six are designed to be expended by the Indians, chiefly in extending their farming operations, building houses, purchasing stock, agricultural implements, and such other things as may promote their improvement and comfort, and shall be so applied by them. But at their request it is agreed that from each of the said annual payments the sum of five hundred dollars shall be reserved for the support of the aged and infirm, and the sum of two thousand dollars shall be set off and applied to the education of their youth; and from each of the first three there shall also be apart and applied the further sum of two thousand dollars, to enable said Indians to settle their affairs. *And as the amount of the annual receipts from the sales of their lands, cannot now be ascertained,* it is agreed that the *President may, from time to time,* and upon consultation with said Indians, *determine how much of the net proceeds of said sales shall be paid them,* and *how much shall be invested in safe and profitable stocks, the interest to be annually paid to them,* or expended for their benefit and improvement. [Italics supplied]

constituted the "remainder" referred to in Article 3, would "likely * * * have similarly been put in trust at interest", and concluded that the discrepancy between the consideration named in the agreement and the probable fair market value thus "becomes more significant".

As noted above, the Indian Claims Commission had not passed on the issue of plaintiff's right to interest in the Nez Perce decision, yet the Court of Claims turned its attention to the question of interest, probably because the plaintiff raised it on appeal and it was argued in the Court of Claims by both parties. Although the Court need not have ruled on this matter, it chose to do so and after stating a well established rule that interest does not run on claims against the United States unless there is an express statutory or contract provision to the contrary, or unless there is a showing of delay in payment for lands taken in contravention of the Fifth Amendment, the Court pointed out that Article 3 of the Nez Perce agreement *as ratified* promised to pay 5% interest on the $1,000,000 remainder which the agreement specified would be held in trust until paid over to the tribe. The Court said that it did not feel it was justified under this agreement in speculating on whether or not a large remainder would have been deposited in the Treasury at interest; that it was not enough for the Court to be able to say that *probably* such larger payment (constituting conscionable consideration) would have been put into the trust, and that apparently the sum actually specified by the agreement was put in trust and did bear interest as provided in the agreement. The opinion emphasized that Article 3 of the Nez Perce agreement did not make the trust "open-ended" but rather provided that the trust would receive the remainder of a specific sum. The Court refused to speculate on what would have happened if the remainder had been larger.

Approximately six months after its *Nez Perce* decision, the Court of Claims rendered its decision in the appeal

of the *Peoria* case, 177 Ct. Cls. 815 (December 16, 1966), in which it affirmed the Indian Claims Commission's action in denying interest to the plaintiff under Article 7 of the Peoria treaty. Article 7 of that treaty (see footnote 1 *supra*) provided that the proceeds from the ceded lands which were to be sold at public auction might, in the discretion of the President, be paid out to the tribe in whatever sums he thought were best, and that the remainder might be invested in safe and profitable stocks, the interest to be paid annually to the members of the tribe or expended for their benefit and improvement. The Court of Claims held that this language was permissive and did not constitute an agreement or consent by the United States to pay interest on the proceeds of the land sale, and, in fact, was not a requirement that the funds be invested at all. The majority opinion referred to its decision in the *Nez Perce* case rendered six months previously as an example that there must be an express consent or agreement by the United States to pay interest as there was in the *Blackfeather* case, *supra*. In the *Peoria* appeal the question of interest was properly before the Court of Claims since the Indian Claims Commission had determined that the United States was liable to the Indians for damages for violation of the treaty agreement to sell the land at public auction to the highest bidder and had also ruled that the plaintiff was not entitled to recover interest. In an opinion dissenting in part on the denial of interest, Judge Davis relied on the *Blackfeather* case, *supra*, and was of the opinion that the Peoria treaty warranted the Commission and the Court in making an award of interest as part of damages for violation of the treaty. However, Judge Davis distinguished the Court's contrary ruling on the interest issue in the *Nez Perce* case rendered six months earlier, on the ground that in the Nez Perce agreement the United States had agreed to pay interest on a precise sum and did exactly that, the trust not being open-ended as it was in the Peoria treaty.

Two months after the decision in the *Peoria* case, the Plaintiff in the *Nez Perce* case filed its petition for writ of certiorari in the Supreme Court on the matter of the denial of interest (Feb. 2, 1967). Defendant opposed the granting of the writ of certiorari on two grounds. First, defendant asserted that the decision of the Court of Claims denying interest was clearly correct, not mentioning the Court's later decision in the *Peoria* case, but attempting to distinguish the Nez Perce agreement from the Blackfeather treaty which treaty had provided for interest to be paid on *all* of the proceeds of the sale of the lands, a sum not ascertainable at the time of the execution of the Blackfeather treaty, whereas the Nez Perce agreement was to pay interest on the remainder of the consideration which happened to be a fixed sum. The defendant's second ground for resisting the granting of the writ of certiorari was that in any event plaintiff's petition was premature since the Indian Claims Commission had not yet ruled on the plaintiff's right to interest and that this ruling might never be made if the Commission, on remand, decided that the plaintiff has received conscionable consideration and was not entitled to an award. Defendant pointed out that if the Commission should find that plaintiff was entitled to an award on the ground of unconscionable consideration, then the plaintiff would have an opportunity to appeal the question of interest if the Commission at that time denied interest. For reasons which, of course, we do not know, the Supreme Court denied certiorari, 386 U. S. 984 (1967).

Slightly more than a year later on April 1, 1968, the Supreme Court, having granted plaintiff's petition for a writ of certiorari in the *Peoria* case, reversed the Court of Claims and remanded the case to the Court and to the Commission to allow additional damages in the light of the Government's obligation under Article 7 of the Peoria treaty to invest the proceeds and pay the interest thereon to the Peorias. 390 U. S. 468. The Supreme Court relied largely on the *Blackfeather* case and made no mention of

the Court of Claims' 1966 decision in the *Nez Perce* case. In its brief in the Supreme Court urging affirmance of the ruling of the Court of Claims denying interest to the Peorias, the defendant made only passing references to the Court of Claims' decision in the *Nez Perce* case. Its most emphatic reference to that decision was its argument that under Article 7 of the Peoria treaty as under Article 3 of the Nez Perce agreement, it would be highly improper for the Court to *speculate* as to what would have happened if the amounts to be placed in trust at interest had been larger than the funds which were available under the respective treaties and that the imposition on the Government of a liability for interest predicated on such a conjecture would be inconsistent with the rule that interest is payable only on the authority of an explicit and unequivocal Congressional mandate.

While the 1966 ruling of the Court of Claims in the *Nez Perce* appeal (176 Ct. Cl. 815) on the matter of plaintiff's right to *interest* on an *award* which the Commission had ruled it was not entitled to receive was dictum, it was certainly not obiter but rather was judicial dictum since the interest issue was one raised by the plaintiff on appeal, argued by both counsel, and deliberately passed upon by the Court although not necessary at that stage of the proceedings. The Commission is mindful of the fact that while such dictum is not necessarily binding on the lower Court or tribunal, it is entitled to great weight as what is known as "carefully considered" or "judicial dictum". See *Flora* v. *United States*, 357 U. S. 63, 68, (1958), 362 U. S. 145, 155 (1960). We have also given careful consideration to Judge Davis' remarks in his "interest" dissent in the *Peoria* case in which he undertook to distinguish the Government's limited obligation to pay interest under Article 3 in the Nez Perce agreement from what he considered to be the defendant's unlimited obligation to pay interest under Article 7 of the Peoria treaty. The distinction he made related primarily to the fact that the trust created by Article 7 in the

Peoria treaty was open-ended because the corpus was unascertainable at the time the trust was created, whereas the trust created by Article 3 of the Nez Perce agreement was not open-ended and specified a particular sum as corpus which was to bear interest and apparently did.

While it is true, as Judge Davis pointed out in his dissent in *Nez Perce*, that the Government lived up to its Article 3 commitment in the Nez Perce agreement as written, it certainly did not live up to that agreement as revised for unconscionable consideration. As revised for unconscionable consideration under Section 2(3) of the Indian Claims Commission Act, the Government violated the agreement by paying an unconscionably low consideration for the land cession. We do not believe that it requires impermissible speculation to conclude that if the agreement had provided for conscionable consideration in the amount which we now hold to have been the 1894 fair market value of the land, the parties would have agreed (1) to the payment to the Indians per capita of the precise amount named in the agreement ($626,222), and (2) to the deposit of *all* of the remainder of such conscionable consideration in the Treasury at interest at 5% to be paid to the tribe at intervals per capita as their needs required. The fact that the "remainder" to be placed in trust under Article 3 of the Nez Perce agreement was a precise sum because the entire consideration was known at the time of the agreement, whereas the "remainder" to be placed in trust for the Peorias was not so ascertainable, is not, we think, a distinction which makes a difference in the Government's obligation to pay interest on the Nez Perce revised "remainder". There was apparently some reluctance on the part of the United States under the Nez Perce agreement, as has been true in many other instances, to pay to the Indians at one time all of the consideration agreed to in the agreement or treaty, whether the consideration was a specified sum or the then unknown proceeds from the later sale of lands being ceded. In this

agreement as in others, the United States elected to pay the Indians an amount considered sufficient for their immediate needs and to place the remainder in trust to draw interest or to be invested in stocks and earn an income and to pay that remainder out to the Indians in installments over a period of time.

While in the *Peoria* case in the Supreme Court, the Court stated that the issue was not the power of the Commission or the Court to award interest against the United States but rather concerned the measure of damages for the treaty's violation in the light of the Government's obligation under the Peoria treaty, the damages that the Court said the Peoria's were entitled to were measured by interest as provided in Article 7 of that treaty, and if the treaty had not provided for the payment of interest on the balance of the consideration which was to be put in trust for the Indians, interest would not have been awarded as part of the damages in that case. In this case, as in *Peoria*, the issue is not whether the Commission has the power to award interest against the United States but is rather the right of the plaintiff *under Article 3 of its 1893 agreement as revised for unconscionable consideration* to have interest on that portion of the remainder of the revised agreement consideration which plaintiff never received. Since we are of the opinion that if the Government had agreed in Article 3 of the Nez Perce agreement to pay the consideration which the Commission now holds it should have agreed to, it would have placed *all* but the $626,222.00 (specified for immediate payment) in trust for the Nez Perce and would have paid 5% interest on the whole amount in the trust in accordance with the terms of Article 3; and because this additional amount has never been paid to the Nez Perce, we hold that this obligation to pay 5% annually continues until the money is paid over.

The plaintiff is entitled to a judgment in the amount of $1,387,911.00 with an additional amount required by Article 3 of the 1893 agreement, measured by simple interest at the rate of 5% per annum from the date of the ratification of the agreement, August 15, 1894, to the date of payment. Since there are no offsets to be claimed in this case,[3] a final award will be entered accordingly.

/s/ Margaret H. Pierce
MARGARET H. PIERCE, Commissioner

Concurring:

/s/ John T. Vance,
JOHN T. VANCE, Commissioner

/s/ Brantley Blue
BRANTLEY BLUE, Commissioner

Concurring except as to award of interest:

/s/ Jerome K. Kuykendall
JEROME K. KUYKENDALL, Chairman

/s/ Richard W. Yarborough,
RICHARD W. YARBOROUGH, Commissioner

[3] Footnote omitted.

Chairman Kuykendall dissenting in part:

I concur with my colleagues in their conclusion that, because the consideration paid by defendant was unconscionable, plaintiff is entitled to recover from defendant the principal sum of $1,387,911. I do not agree that plaintiff may recover interest on that sum.

The majority have narrated in great detail the history of *Peoria Tribe of Indians of Oklahoma* v. *United States*, 15 Ind. Cl. Comm. 123 (1965), affirmed 176 Ct. Cl. 815 (1966) and reversed 390 U.S. 468 (1968) and seem to place great reliance on the Supreme Court's decision therein as a precedent which controls this case. Actually, the *Peoria* case has no bearing on the question before us.

The opinion of the Supreme Court in *Peoria* contains nothing which is applicable to *Nez Perce* and enunciates no new legal principle of any kind. In *Peoria* the Court held only that that case was controlled by an 1894 decision of the Court, *United States* v. *Blackfeather*, 155 U.S. 180, a case in which the facts are almost identical with those of *Peoria*. The only relevant difference was that in *Peoria* the language of the treaty describing the duties of the United States was not as direct and unequivocal as it was in *Blackfeather*. This Commission and the Court of Claims thought that that difference required a decision in favor of the defendant. The Supreme Court held to the contrary. In so doing, it did not establish any new legal principle of legal liability. It merely held that the defendant had violated the treaty and that plaintiff was entitled to recover damages therefor.

Nez Perce, in its present posture, allows the plaintiff recovery because the consideration paid by the defendant was unconscionable. It does not involve any question of violation of an Agreement. On the other hand, *Peoria* involved only the question of whether a treaty had been violated and unconscionable consideration was not an element of the case.

In *Nez Perce* the unanimous opinion of the Court of Claims contains the following language on pages 829 and 830, which is dispositive of the issue now before the Commission:

> There remains the question of whether the appellant is entitled to interest on its recovery.[7] Appellant now seeks interest on the theory that if the United States had paid an amount equal to the fair market value of the land at the time of the cession, this additional sum would have drawn interest in the same manner and at the same rate as provided for the $1,000,000 held in trust under the Agreement's Article III. 28 Stat. 326, 329. It is, of course, well established that interest does not run on claims against the United States unless there is an express statutory or contract provision to the contrary or unless there is a showing of delay in payment for lands "taken" in contravention of the Fifth Amendment. 28 U.S.C. § 2516(a) (1964 Ed.). *United States* v. *Alcea Band of Tillamooks*, 341 U.S. 48, 49 (1951); *United States* v. *Thayer-West Point Hotel*, 329 U.S. 585, 588 (1947); *Cf.*, *Confederated Salish and Kootenai Tribes* v. *United States*, Ct. Cl. No. 50233, decided May 13, 1966. Thus appellant's burden here is to show that the Agreement as ratified would have given it five percent interest on the differential amount had it been paid to the trust in 1894. The Agreement is quite specific. Article III, *supra*, provides that the Nez Perce Indians shall be paid $1,626,222 exactly; the $626,222 portion to be paid "to said Indians per capita as soon as practicable after the ratification of this Agreement," the "remainder of said sum" (equalling $1,000,000) to be held in trust. Earlier in this opinion, we speculated that had the government paid the fair market value in 1894, it probably would have agreed to hold the extra money in trust in the same manner as the $1,000,000. How-

[7] No mention was made of interest in the petition before the Indian Claims Commission. Appellant says, however, that it did assert the claim at the beginning of trial, and all parties have been fully aware of the issue since then.

> ever, that speculation was appropriate only as it related to the question of whether the consideration was unconscionable. In determining whether the Agreement should be read so as to give appellant interest on the difference between the price paid and the fair market value, it is not enough for us to be able to say that *probably* a larger payment would have been put into the trust. Article III did not make the trust open-ended. It was to receive "the remainder" of a specific sum. What would have happened had the sum been larger it is impossible for us to say. This is not a case like the *Pawnee Tribe* v. *United States*, 56 Ct. Cl. 1, 15 (1920), in which this court awarded interest on an amount which the agreement specified but which the United States had for some unknown reason never paid. 27 Stat. 612, 644. The Agreement here specified a sum to bear interest, and that sum apparently was paid and did bear interest; the sum claimed here is over and above the amount specified in the Agreement. In short, the Agreement has reference only to the amount that was actually agreed upon and gives no warrant for reading in a requirement that any sum determined in the future to be the fair market value should bear interest.

The thrust of the foregoing language was repeated by Judge Davis and concurred in by Judge Durfee in their dissent to the majority opinion of the Court of Claims in *Peoria*. The language which appears on page 775 is as follows:

> . . . In *Nez Perce Tribe* v. *United States*, *supra*, 176 Ct. Cl. 815, 830, the particular treaty specified a precise sum to bear interest ($1,000,000), and "did not make the trust open-ended. * * * The Agreement here specified a sum to bear interest, and that sum apparently was paid and did bear interest; the sum claimed here is over and above the amount specified in the Agreement. In short, the Agreement has reference only to the amount that was actually agreed upon [i.e., $1,626,222] and gives no warrant

for reading in a requirement that any sum determined in the future to be the fair market value should bear interest." The present treaty, in contrast, is open-ended in its terms; it covers, not a specified sum, but all the net proceeds and receipts from the sales. The $172,000 represents a major part of the proceeds which should have been set apart for the Tribe and invested.[6]

It readily may be seen that all of the rationale which the majority have employed to reach the conclusion that defendant is liable for interest on the principal sum awarded to plaintiff herein is in contravention of what a unanimous Court of Claims has said in this very case and what two judges thereof have repeated in another case.

Under our system of jurisprudence it is essential to the administration of justice that all inferior judicial or quasi judicial bodies adhere to the doctrine of *stare decisis*. We are obligated by law to do so.

The majority have not only disregarded *stare decisis*, but have completely ignored the *law of the case* as clearly enunciated by the Court of Claims in the language above quoted. Even if said language was judicial dictum at the time the Court's opinion was issued, it should not be disregarded. Furthermore, an additional factor is now present. Our decision herein provides a basis for direct application of what the Court said and the Court's ruling is now indisputably germane. We have no power to allow interest on an award to plaintiff.

/s/ Jerome K. Kuykendall
JEROME K. KUYKENDALL, Chairman

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[6] It is irrelevant that an award of interest, pursuant to the 1854 treaty, could increase the award to plaintiff by five or six times. If the treaty so provides, we cannot refuse interest because the amount is relatively large.

Commissioner Yarborough dissenting in part:

I concur with the majority in their finding as to the principal sum to be recovered by the plaintiffs, but not as to the allowance of interest. Even though the majority has carefully demonstrated that the state of the precedents now requires the Commission to make a *de novo* determination of the interest question, it is submitted that the precedents do not allow the Commission to award interest here.

A proper reading of the Supreme Court's opinion in the *Peoria* case, *supra*, does not lead to the same result in this case. The significant language in *Peoria* is as follows:

> "In supporting the judgment of the Court of Claims, the respondent relies heavily upon the general rule that the United States is not liable for interest on claims against it. This general rule, as the respondent points out, has been held to be fully applicable to the claims of Indian tribes. But this is not a case where the Court is asked to exercise 'the power to award interest against the United States,' *United States* v. *New York Rayon Importing Co.*, 329 U.S. 654, 663. The issue, rather concerns the measure of damages for the treaty's violation in the light of the Government's obligations under that treaty." 390 U.S. 468, at 470-71 (footnotes omitted).

The *Peoria* case involves a violation of a treaty, and damages measured by what the treaty called for if carried out. This case is not comparable because the agreement was not violated. The *Peoria* reasoning could properly be invoked if, say, the United States had failed to pay to the Nez Perce a portion of the agreed-on consideration, but absent such a violation of the agreement there is no authority to support an award of interest founded on revision of an agreement or the Commission's general equitable powers. See, e.g., *Loyal Creek Indians* v. *United States*, 118 Ct. Cl. 373, 383 (1951); *Osage*

Nation of Indians v. *United States*, 119 Ct. Cl. 592, 671-2 (1951).

I agree with the majority's feeling of equitable merit in the allowance of interest; it exists in all our cases where the long-deferred compensation in 19th Century land values is measured against 20th Century needs and the 1969 economy. The settled course of precedent in the superior courts, however, seems clearly contrary to any attempt by the Commission to expand the awarding of interest by its discretion.[1] It may be that Congress should consider the question as a matter of policy, but it is not now within our power to vary the settled construction of the Act.

As to the majority's use of the phrase "unconscionable consideration," I incorporate by reference my views in the *Lummi* case, 21 Ind. Cl. Comm. 408, at 413.

/s/ Richard W. Yarborough
RICHARD W. YARBOROUGH, Commissioner

[1] Of course, where our Act clearly gives the Commission broad powers of discretion, as in determining offsets, the Commission may properly look to all equitable considerations. See *Delaware Tribe* v. *United States*, 21 Ind. Cl. Comm. 18 (1969).

APPENDIX C

176 Ct. Cl. 815

IN THE UNITED STATES COURT OF CLAIMS

Appeal No. 5-64

(Decided July 15, 1966)

NEZ PERCE TRIBE OF INDIANS

v.

THE UNITED STATES

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS and COLLINS, *Judges*.

OPINION

LARAMORE, *Judge*, delivered the opinion of the court:

In this case the Nez Perce Tribe of Indians appeals from a decision of the Indian Claims Commission [1] that it is not entitled to a recovery under section 2, clauses (3) and (5) of the Indian Claims Commission Act.[2]

Appellant claims additional compensation for the reservation lands which it ceded to the United States by the

[1] 13 Ind. Cl. Comm. 184 (April 7, 1964).

[2] 60 Stat. 1049, 1050 (1946). Clauses (3) and (5) of section 2 provide: "The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe * * *: (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, [or] unconscionable consideration * * *; (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity."

Agreement of May 1, 1893, ratified August 15, 1894, 28 Stat. 286, 326-332. Prior to the Agreement, appellant owned a treaty reservation[3] in northern Idaho which contained some 762,000 acres. Under the Agreement, part of the reservation was allotted to individual Indians and to the Tribe for trust lands. The remaining land, comprising 549,559 acres was ceded to the appellee for a purchase price of $2.97 per acre. The appellant contended before the Commission that the ceded lands had a fair market value of $12.63 per acre on August 15, 1894, the agreed valuation date. The appellee argued that the evidence supported a value of $1.29 per acre. The Commission indicated that the evidence would support a value of $4 per acre as a maximum,[4] but decided that the $2.97 per acre which the appellant received was not sufficiently less than the maximum $4 value to be considered "unconscionable." In addition, the Commission concluded that appellant had not succeeded in establishing that there was any fraud or duress or unfair and dishonorable dealing in connection with the negotiations and execution of the Agreement. In a concurring opinion, Commissioner Scott wrote that he personally found the discrepancy unconscionable, particularly viewed in gross—*i.e.*, the $1.03 difference multiplied by the 549,559 acres involved amounts to $566,045.77. However, he felt bound by precedents indicating that the discrepancy must be "very gross."[5] We are of the view that there is substantial evidence in the record indicating a value of $4 per acre, but unlike the Commission, we think this is a minimum figure. We

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[3] In a treaty dated June 11, 1855 and ratified on March 8, 1859, a reservation of roughly seven million acres was set aside for the Nez Perce Tribe. 12 Stat. 957-962. The lands in controversy are part of that original reservation.

[4] 13 Ind. Cl. Comm., at 264.

[5] *E.g.*, *Otoe and Missouria Tribe of Indians* v. *United States*, 131 Ct. Cl. 593, 131 F. Supp. 265, *cert. denied*, 350 U.S. 848 (1955); *Osage Nation of Indians* v. *United States*, 119 Ct. Cl. 592, 97 F. Supp. 381, *cert. denied*, 342 U.S. 896 (1951).

agree with the Commission that the appellant has not shown fraud or duress or that the dealings were other than "fair and honorable." We disagree, however, with the Commission's view of the law of unconscionable consideration and, accordingly reverse and remand the case for further proceedings.

By way of background, the Nez Perce Tribe in 1855 ceded to the United States a tremendous area in the Territory of Washington which then included what is now part of the present State of Washington and northern Idaho. This agreement or treaty was ratified in 1859. 12 Stat. 957. In its Article II, the agreement provided for a large reservation, a portion of which was later ceded in 1894 and is involved here. The relevant portion of the 1859 reservation was located in northern Idaho just east of Lewiston. The area consisted mainly of a high and gently undulating plateau cut into blocks by canyons. The rainfall, climate, and soils, were generally favorable for the raising of cereal crops, especially wheat. The area was an extension of the Palouse country and had similar soils. Slightly over one-half of the ceded area had a highest and best use for agriculture. Somewhat less than one-quarter of the ceded area had a highest and best use as timberland. These areas contained a good commercial grade of timber for which there was an expanding local market. The remaining land was classified as range land and was well-suited for livestock grazing.

By 1894, the Lewiston area was fairly well-settled and growing. The city itself was founded in 1861 at the confluence of the Snake and Clearwater Rivers, the latter running through the northern part of the reservation. It was the first capital of the Idaho territory and by 1867 was the population center of the Walla Walla Valley.

In 1890, the neighboring counties to the reservation had substantial amounts of acreage under cultivation. Thus, Nez Perce, Shoshone, and Idaho counties reported 48,339 cultivated acres; the figure for Whitman, Garfield,

Columbia, and Asotin counties was 237,558 acres. This indicates that both the market (presumably in Lewiston) and transportation facilities adequately served the area. The Clearwater River was navigable for river transportation for a short distance into the subject area. Rail transportation was available a short distance outside, to the north. There was also wagon trails across the reservation.

The 1893 Agreement gave the Indians first choice through the allotment provision. These allotments, totaling 180,657 acres, were generally scattered throughout the reservation excepting some concentration around the existing Indian settlement in the northwest section of the ceded area. The soil and topographical maps suggest that the Indians chose wisely. About two-thirds of the lands selected by them were in the most favorable land classification. Their selection of the lands in the northwest section might be explained by their proximity to Lewiston and better river transportation. Their selection of the most northwestern plateau lands above the Clearwater River is probably best explained by the fact that the Palouse soil area (apparently the best wheat-growing area) continues south of this plateau and the railroad is closest to this area.

The unallotted or ceded lands were opened to the public on November 18, 1895, and the best lands were taken very quickly. There were 507 homestead filings in the first 13 days following the reservation's opening. The Agreement of 1893 and the proclamation opening the lands to settlement provided that settlers pay $3.75 per acre for agricultural lands and $5 per acre for stone, timber and mineral lands. 28 Stat. 326, 332. During the first five years 68 percent of the land was taken, and by 1905, 10 years after the lands had been opened, 87 percent was taken. A total of 449,160 acres was acquired free under the homestead laws; 14,800 agricultural acres were bought for the statutory $3.75 per acre; 9,320 tim-

ber acres were bought for the statutory $5 per acre; 27,200 acres were reserved for state schools; 7,880 acres were retained by the United States for public use or leased for grazing; 4,240 acres were placed in public water reserve; and the remaining 36,400 acres were reserved for miscellaneous uses such as for churches and power sites.

The picture we get, in summary, is that of a large tract of virgin land (about 850 square miles) adaptable to varied uses, the 1894 market value of which was necessarily lowered by its sheer size, the necessity of substantial development expenditures, and its lesser degree of accessibility to markets than other nearby acres. In addition to these negatives, there was the supply and demand factor as such; that is to say, the northern Idaho area, although no doubt relatively populous for a new territory, simply did not have the kind of population growth that exerts a real inflationary bias on land values. Whatever pressure there was to settle new land, and there obviously was some pressure as the very fact of the Nez Perce cession suggests, it was probably deferrable. It is significant to note in this connection that the 1894 valuation date falls at the low point of the so-called "Cleveland Depression." Farm product prices were markedly affected during this period, so it is reasonable to assume that land values were diminished as well. Such generalities, of course, do not give the answer to the question of fact we must resolve; they are at best common sense guidelines, useful in viewing the evidence to determine whether the value of the cession in 1894 was closer to $4 per acre than it was to $12 per acre.

The principal evidence on valuation is contained in the two appraisal reports and the testimony of the parties' expert witnesses. Appellant relies on the testimony of William C. Brown, appellee on the testimony of Homer Hoyt. Both appraisers arrived at their ultimate value figures ($11.89 per acre for Brown; $1.29 per acre for

Hoyt) primarily by looking at so-called "comparable sales." In addition, they looked at the topography, soil conditions, transportation availability—to name a few other factors—and have supplied us with a substantial record of maps, photographs, and charts to buttress their conclusions. In evaluating this volume of material, the Commission concentrated on the "comparable sales" in areas proximate to the reservation, and struck a balance between what it considered to be the extreme positions of the experts. Thus, the Commission observed that appellant's expert Brown looked to many land transactions with prices exceeding $20 per acre which occurred in well-settled areas where the land was frequently of better quality, transportation was superior, and rainfall was more plentiful. In addition, it noted that many of the sales were of farms which were improved—*i.e.*, with fences, buildings, watering facilities—and which had been settled for some years before the valuation date. So it concluded, as did Brown, that these sales would have to be discounted to make them "comparable" to the reservation land. Brown used a 20 percent discount; the Commission obviously used something greater. On the other hand, the Commission observed that appellee's expert, Hoyt, considered many less sales in his analysis and in many instances looked to distant lands not in any way comparable to the ceded lands. The Commission, in effect, concluded that Hoyt over-discounted the value of the lands which both he and Brown considered, and improperly considered lands beyond the zone of even bare comparability.

We agree with the Commission that Brown was overly optimistic and Hoyt overly pessimistic. We are also in accord with the Commission's apparent inclination toward Brown's basic method. However, in concluding that the evidence shows that the land was worth a minimum and not a maximum of $4 per acre, we have viewed the evidence, and particularly the appaisal method used by Brown, somewhat differently from the Commission.

Brown's report shows the average sales price of agricultural lands in the counties in which parts of the ceded tract were located ("tract counties") to be $15.70 per acre. This was the result of the investigation of 174 sales covering 38,335 acres. Timberland sales averaged $13.38 per acre in these counties and range land $4.54 per acre. For so-called "comparable counties"—*i.e.*, counties neighboring the counties in which parts of the reservation were located—Brown found sales price averages to be somewhat lower than in the tract counties. Averaging the tract county and comparable county figures, he determined that agricultural land in the tract area in 1894 was worth $15.42 per acre, timberland $13.01 per acre, and range land $4.11 per acre. He multiplied these averages by the tract acreage in each of these categories to arrive at a value for the entire half-million acres of $11.89 per acre.

In computing the average sales price figures in the first step above, Brown applied a 20 percent discount to the actual sales prices. Stated differently, he discounted the $19.80 per acre average sales price of tract and comparable county agricultural lands to $15.42. This discount he felt was necessary to reflect the fact that the $19.80 per acre average included improvements to the land and improvements on the land, *e.g.*, the value of buildings and fixtures, plowing, watering facilities and fencing. In addition, he applied a scale of discounts to arrive at the $19.80, these discounts to take into account the purchasing power of the dollar in the area (*i.e.*, the price index from 1890-1900). We have no quarrel with the latter discounts. We do think, however, that the 20 percent discount may be unrealistically low. Brown went to great effort to document his 20 percent figure, and perhaps so far as it goes it is accurate. We think it should be expanded to cover not just the value of the improvements to the "comparable" lands, but also to cover the "real" cost of improving the ceded lands. This broadens the concept of discount to make the comparison to the tract

county and comparable county lands more meaningful. The topography alone suggests there was substantial barriers to bringing in the labor and material necessary to improve the land to the degree that land was improved on the Palouse plateau which was nearer the railroads and population "centers." While we cannot supply a precise figure for the proper discount, we think something in the range of 25 percent may better take into account the premium which "improved" land in the other areas could have commanded over the ceded lands.

In addition to the improvement discount, we think the land values in other areas, if they are to be used as the guide here, should be further discounted to take account of the remoteness of the ceded land. Brown made no such discount. Granting that a railroad came within two miles of the northern boundary and that the Clearwater River was regularly navigable at least for a few miles in the northwest part, the topography was such that transportation of wheat, hay, or timber would have been readily accessible in a relatively limited part of the ceded area, and the allotment map suggests that the Indians chose the prime land in the most accessible areas. Accordingly, we feel that a purchaser of the ceded area would have expected to pay some percent less than the price he would have expected to pay for land on the Palouse plateau or near the Snake River, for example—both being areas considered as comparable by Brown. This might have been 20 to 25 percent.

Finally, we note regarding Brown's method, that he made no discount for size. We think this is an extremely important feature entering into market value. A purchaser of over one-half million acres simply would not pay what 1,000 purchasers of 500 acres each would be willing to pay. Of course, the Indians were in a sense compelled to cede the land, while they might have preferred to sell it piecemeal over a number of years to the hypothetical 1,000 purchasers of 500 acres each. So we

are loth to allow the government to get a bargain because it compelled the Indians to cede the land. It is simply the fact, however, that in buying such a large, undeveloped tract, the government undertook the project of dividing and selling the land. *Cf. Miami Tribe of Oklahoma* v. *United States*, 9 Ind. Cl. Comm. 1, 17 (1960), *aff'd by order*, 159 Ct. Cl. 593 (1962). These are expenses the Indians were saved by selling the land as a unit. In addition, by buying the land and holding it pending disposition, the government lost the interest on the amount of the purchase price for the period prior to resale. Any purchaser of a large tract necessarily must take account of the "interest cost" of holding land pending resale. How much of a discount is warranted by the size it is difficult to say. We think, however, that something in the range of 20-25 percent might be reasonable.

By adding together a 25 percent discount for improvements, a 20-25 percent discount for remoteness and inaccessibility, a 20-25 pereent discount for size, and applying this to Brown's "comparable" sales, it is possible to come up with a figure fairly close to $4—*i.e.*, $20 per acre less 65 to 75 percent equals $5 to $7. This is, of course, the roughtest form of estimating. We do not suggest that these discounts either were used by the Commission or should have been. We do not know how it arrived at the conclusion that "a figure as high as $4.00 per acre might be indicated * * * [,] [b]ut in no event * * * could [it] have exceeded $4.00 per acre." In our review of the opinion, findings of fact, and record to determine whether there is substantial evidence to support a $4 figure, we have had to consider what the Commission might have had in mind. We think the discounts, which of course can be conveniently altered to produce a wide spectrum of possible values, are a reasonable approximation of what the Commission did. It should be clear, however, that the discounts we have said might be within a range of reasonableness are in no sense absolutes; they are but

steps in analyzing the reasonableness of the Commission's conclusion in the light of the evidence. Property appraisal is an inexact science at best; this is particularly so when the valuation date is 70 years distant from the appraisal date. So any discounts other than those which can be documented (*e.g.*, Brown's 20 percent discount for improvements) will necessarily be left to conjecture—the reasonableness of which is largely a matter of common sense.

To reiterate, we think that the $4 per acre figure is supported by substantial evidence. It is, however, at the threshold, and not at the ceiling as the Commission determined. We think the overwhelming weight of the evidence shows that the Commission should have found the $4 figure to be the minimum. In so concluding, we have considered the Brown and Hoyt comparable sales analyses, giving more weight to Brown's. Since none of the sales were strictly comparable, we have looked at the discounting methods which were used by the appraisers implicitly or explicitly to make the other sales comparable. To Brown's method of discounting improvements we have added additional discounts for remoteness and size. Also in our thinking has been the effect of the 1894 depression on property values and the effect of the allotments. Finally, we have thought it significant that the 1894 Treaty provided for a sales price of $3.75 per acre for agricultural land and $5 per acre for timberland, and a substantial amount of acreage was bought by settlers after 1894 at these prices. No doubt the government would be entitled to some premium over its purchase price ($2.97 per acre here), but the very size of the premium here suggests that the bargain was too good.

The question then arises as to whether the difference between the $2.97 per acre paid to the Indians and the $4 per acre minimum value is sufficiently large as to be unconscionable under section 2 of the Indian Claims Commission Act. 60 Stat. 1049, 1050. In *Osage Nation* v.

United States, 1 Ind. Cl. Comm. 43 (1948), the Commission was called upon to define "unconscionable consideration" as used in the Act. It concluded that the dividing line between what is grossly inadequate consideration and what is merely inadequate was a peculiarly factual question. In affirming the Commission's approach, this court wrote:

> Appellants urge that no showing of actual fraud is required for relief on the grounds of unconscionable consideration. There are cases which seem to support both views, but it appears that only where the inequality of the bargain is very gross, does disparity of price alone justify a conclusion that the consideration was unconscionable. *As to what is "very gross," the courts have provided no exact formula and each case must be carefully considered on its own particular facts and circumstances.* [Emphasis added.] [119 Ct. Cl. 592, 666, 97 F. Supp. 381, 421, *cert. denied*, 342 U.S. 896 (1951).]

The "facts and circumstances" inquiry has always been crucial in each case, and there is no ready-made test. Thus, although this court's cases holding that a particular consideration was unconscionable have involved discrepancies of over 100 percent (the percentage difference between the factual value and the amount paid), there has been no indication that lesser percentage discrepancies are exempt from the challenge of unconscionability. See *Sac and Fox Tribe of Indians of Oklahoma* v. *United States*, 167 Ct. Cl. 710, 340 F. 2d 368 (1964), *Otoe and Missouria Tribe* v. *United States*, 131 Ct. Cl. 593, 131 F. Supp. 265, *cert. denied*, 350 U.S. 848 (1955); *Osage Nation of Indians* v. *United States*, *supra*. The Commission has, however, taken the strict view that discrepancies considerably less than 100 percent are not unconscionable. In *Miami Tribe* v. *United States*, 6 Ind. Cl. Comm. 513 (1958),[6] it held that payment of 63 percent (a 59

[6] When the decision was appealed, this court found that the Commission had erred in determining the amount of the consideration

percent discrepancy) of the true value was not unconscionable. In the present case it has held that a payment of 75 percent (a 33⅓ percent discrepancy) is not unconscionable. See also *Pottawatomie Tribe* v. *United States*, 3 Ind. Cl. Comm. 10, 61 (1954). We think that the Commission has relied too much on the bare percentage discrepancy.

In the present case, inquiry into all the "facts and circumstances" puts the situation in a somewhat different light. Specifically, it is significant to us that the ceded area was comprised of 549,559 acres. The $1.03 difference between the amount paid and the market value multiplied by this acreage totals $566,045.77. Granting that this represents the same 33⅓ percent discrepancy, it has a different taste. Half a million dollars in 1894 was a very substantial sum. When we consider that the Agreement provided that $1,000,000 of the total $1,626,222 consideration was to be put in trust to earn five percent interest and that it is likely that the $566,045.77 discrepancy would have similarly been put in trust at interest, the discrepancy becomes still more significant. The trust provided that a $50,000 distribution would be made one year after ratification with semi-annual $150,000 distributions thereafter—five percent interest to accrue on the unpaid balance. Agreement of May 1, 1893, Article III, 28 Stat. 326, 329. Assuming that the $566,045.77 discrepancy had been put into the trust in 1894, no part of it would have been distributed for about five years, and then it would have taken two years to distribute the corpus alone. As a very rought estimate, the interest would have been close to $200,000 for the duration that the discrepancy hypothetically would have been held in trust. When added to the $566,045.77 discrepancy, this

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which the Miami Tribe received for its lands and that this figure amounted to only 38 percent of the true value. 150 Ct. Cl. 725 (1960), *cert. denied*, 366 U.S. 924 (1961). Thus, the court did not reach the question whether payment of 63 percent of value was adequate *per se*.

interest component raises the percentage discrepancy from 33⅓ percent to about 50 percent.

For purposes of judging whether the consideration was unconscionable, it is also significant that the $4 per acre figure which produces the $566,045.77 discrepancy is a bare minimum. It should be clear from our discussion on the valuation aspect that we think the evidence would support a higher value. Accordingly, although we do not remand the case to the Commission with express instructions to find a higher value, we do feel that it is appropriate to look to some higher, unstated value in resolving the "unconscionable consideration" issue. No doubt the reason for the Commission's view that the percentage discrepancy is of cardinal importance is that it is impossible to determine a "true" value for land. It is just common sence that some discrepancy, very possibly up to 33⅓ percent, can be expected to result simply from differences in opinion. However, the present case is not the usual situation because we have eliminated one aspect that is typically present in situations in which there are ligitimate differences of opinion. This point may be developed by reference to the facts in the present case. The Indians received $2.97 per acre and the land was worth $4 at the very lease. Were this a normal real property transaction between a willing buyer and seller, this discrepancy could be explained as resulting from a legitimate difference of opinion or as a good bargain for the buyer and a bad bargain for the seller, but in no sense as an unfair bargain. By concluding that the $4 per acre figure is a bare minimum, however, we have eliminated the aspect of the "legitimate" margin between $2.97 and $4 per acre. That is to say, we believe that no reasonable seller in a willing transaction under any circumstances would have parted with ownership of the ceded area for less than $4 per acre. So on the facts of this case, the "legitimate" margin is not between $2.97 and $4, but between $4 and something greater.

At the risk of being repetitious, we stress that the percentage discrepancy between what the Indians were paid and what the land was worth is not the sole measure of unconscionable consideration. We also stress that we do not depart from our prior position that the price disparity must be "very gross." We think we are giving effect to both the percentage test and the "very gross" test (which should be substantially identical) in looking to the total discrepancy, to the interest factor, and most importantly to the fact that the $4 per acre value is a bare minimum.

There remains the question of whether the appellant is entitled to interest on its recovery.[7] Appellant now seeks interest on the theory that if the United States had paid an amount equal to the fair market value of the land at the time of the cession, this additional sum would have drawn interest in the same manner and at the same rate as provided for the $1,000,000 held in trust under the Agreement's Article III. 28 Stat. 326, 329. It is, of course, well established that interest does not run on claims against the United States unless there is an express statutory or contract provision to the contrary or unless there is a showing of delay in payment for lands "taken" in contravention of the Fifth Amendment. 28 U.S.C. § 2516(a) (1964 Ed.). *United States* v. *Alcea Band of. Tillamooks*, 341 U.S. 48, 49 (1951); *United States* v. *Thayer-West Point Hotel*, 329 U.S. 585, 588 (1947); *Cf., Confederated Salish and Kootenai Tribes* v. *United States*, Ct. Cl. No. 50233, decided May 13, 1966. Thus appellant's burden here is to show that the Agreement as ratified would have given it five percent interest on the differential amount had it been paid to the trust in 1894. The Agreement is quite specific. Article III,

[7] No mention was made of interest in the petition before the Indian Claims Commission. Appellant says, however, that it did assert the claim at the beginning of trial, and all parties have been fully aware of the issue since then.

supra, provides that the Nez Perce Indians shall be paid $1,626,222 exactly; the $626,222 portion to be paid "to said Indians per capita as soon as practicable after the ratification of this Agreement," the "remainder of said sum" (equalling $1,000,000) to be held in trust. Earlier in this opinion, we speculated that had the government paid the fair market value in 1894, it probably would have agreed to hold the extra money in trust in the same manner as the $1,000,000. However, that speculation was appropriate only as it related to the question of whether the consideration was unconscionable. In determining whether the Agreement should be read so as to give appellant interest on the difference between the price paid and the fair market value, it is not enough for us to be able to say that *probably* a large payment would have been put into the trust. Article III did not make the trust open-ended. It was to receive "the remainder" of a specific sum. What would have happened had the sum been larger it is impossible for us to say. This is not a case like the *Pawnee Tribe* v. *United States*, 56 Ct. Cl. 1, 15 (1920), in which this court awarded interest on an amount which the agreement specified but which the United States had for some unknown reason never paid. 27 Stat. 612, 644. The Agreement here specified a sum to bear interest, and that sum apparently was paid and did bear interest; the sum claimed here is over and above the amount specified in the Agreement. In short, the Agreement has reference only to the amount that was actually agreed upon and gives no warrant for reading in a requirement that any sum determined in the future to be the fair market value should bear interest.

Accordingly, the decision of the Indian Claims Commission is reversed, and the case is remanded for further proceedings in conformity with this opinion.

Reversed and *remanded*.

APPENDIX D

AGREEMENT WITH THE NEZ PERCE INDIANS IN IDAHO.
(28 Stat. 286, 326-332)

SEC. 16. Whereas Robert Schleicher, James F. Allen, and Cyrus Beede, duly appointed commissioners on the part of the United States, did on the first day of May, eighteen hundred and ninety-three, conclude on agreement with the principal men and other male adults of the Nez Perce tribe of Indians upon the Lapwai Reservation, in the State of Idaho, which said agreement is as follows:

Whereas the President, under date of October thirty-first, eighteen hundred and ninety-two, and under the provisions of the Act of Congress entitled "An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," approved February eighth, eighteen hundred and eighty-seven, authorized negotiations with the Nez Perce Indians in Idaho for the cession of their surplus land; and

Whereas the said Nez Perce Indians are willing to dispose of a portion of the tract of land in the State of Idaho reserved as a home for their use and occupation by the second article of the treaty between said Indians and the United States, concluded June ninth, eighteen hundred and sixty-three:

Now, therefore, this agreement made and entered into in pursuance of the provisions of said act of Congress approved February eighth, eighteen hundred and eighty-seven, at the Nez Perce Agency, by Robert Schleicher, James F. Allen, and Cyrus Beede, on the part of the United States, and the principal men and male adults of the Nez Perce tribe of Indians located on said Nez Perce Reservation, witnesseth:

ARTICLE I.

The said Nez Perce Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of said reservation, saving and excepting the following described tracts of lands, which are hereby retained by the said Indians, viz:

[Voluminous detailed description of land omitted.]

ARTICLE II.

It is also stipulated and agreed that the place known as "the boom" on the Clearwater River, near the mouth of Lapwai Creek, shall be excepted from this cession and reserved for the common use of the tribe, with full right of access thereto, and that the tract of land adjoining said boom, now occupied by James Moses, shall be allotted to him in such manner as not to interfere with such rights. Also, that there shall be reserved from said cession the land described as follows: "Commencing at a point at the margin of Clearwater River, on the south side thereof, which is three hundred yards below where the middle thread of Lapwai Creek empties into said river; run thence up the margin of said Clearwater River at low-water mark, nine hundred yards to a point; run thence south two hundred and fifty yards to a point; thence southwesterly, in a line to the southeast corner of a stone building, partly finished as a church; thence west three hundred yards to a point; thence from said point northerly in a straight line to the point of beginning; and also the adjoining tract of land lying southerly of said tract, on the south end thereof; commencing at the said corner of said church, and at the point three hundred yards west thereof, and run a line from each of said points. One of said lines running on the east side and the other on the west of said Lapwai Creek; along the foothills of each side of said creek; up the same sufficiently far so that a line being drawn east and west to intersect the aforesaid lines shall embrace within its boundaries, together

with the first above described tract of land, a sufficient quantity of land as to include and comprise six hundred and forty acres;" for which described tract of land the United States stipulates and agrees to pay to William G. Langford, his heirs or assigns, the sum of twenty thousand dollars, upon the execution by said Langford, his heirs or assigns, of a release and relinquishment to the United States of all right, title, interest, or claim, either legal or equitable, in and to said tracts of land, derived by virtue of a quit-claim deed of February fourteenth, eighteen hundred and sixty-eight, to the said William G. Langford, from Langdon S. Ward, treasurer of the American Board of Commissioners for Foreign Missions, which release and relinquishment shall be satisfactory to the Secretary of the Interior, and it is stipulated and agreed by said Nez Perce Indians that upon the execution and approval of such release and relinquishment the right of occupancy of said Indians in said described tracts shall terminate and cease and the complete title thereto immediately vest in the United States; *Provided*, That any member of the said Nez Perce tribe of Indians entitled to an allotment now occuping and having valuable improvements upon any of said lands not already occupied or improved by the United States may have the same allotted to him in such subdivisions as shall be prescribed and approved by the Secretary of the Interior, in lieu of an equal quantity of agricultural land allotted to him elsewhere; and for this purpose shall relinquish any patent that may have been issued to him before the title to said "Langford" tracts of land shall vest in the United States, and shall have a new patent issued to him of the form and legal effect prescribed by the fifth section of the act of February eighth, eighteen hundred and eighty-seven (twenty-fourth Statutes, three hundred and eighty-eight), covering the new allotment and that portion of the former allotment not surrendered. It is further agreed that five acres of said tract, upon which the Indian Presbyterian Church is located, as long

as same shall remain a church, shall be patented to the trustees of said church; that the said five acres shall not include improvements made by the United States; the said five acres to be selected under the direction of the Commissioner of Indian Affairs.

ARTICLE III.

In consideration for the lands ceded, sold, relinquished, and conveyed as aforesaid the United States stipulates and agrees to pay to the said Nez Perce Indians the sum of one million six hundred and twenty-six thousand two hundred and twenty-two dollars, of which amount the sum of six hundred and twenty-six thousand two hundred and twenty-two dollars shall be paid to said Indians per capita as soon as practicable after the ratification of this agreement. The remainder of said sum of one million six hundred and twenty-six thousand two hundred and twenty-two dollars shall be deposited in the Treasury of the United States to the credit of the "Nes Perces Indians, of Idaho," and shall bear interest at the rate of five per centum per arrum, which principal and interest shall be paid to said Indians per capita as follows, to wit: At the expiration of one year from the date of the ratification of this agreement the sum of fifty thousand dollars, and semi-annually thereafter the sum of one hundred and fifty thousand dollars with the interest on the unexpended portion of the fund of one million dollars until the entire amount shall have been paid, and no part of the funds to be derived from the cession of lands by this agreement made shall be diverted or withheld from the disposition made by this article on account of any depredation or other act committed by any Nez Perce Indian, prior to the execution of this agreement, but the same shall be actually paid to the Indians in cash, in the manner and at the times as herein stipulated.

ARTICLE IV.

It is further stipulated and agreed that the United States will purchase for the use of said Nez Perce Indians

two portable steam saw mills, at a cost not exceeding ten thousand dollars, and will provide for said Indians, for a period not exceeding two years, and at a cost not exceeding twenty-four hundred dollars, a competent surveyor, for the purpose of fully informing said Indians as to the correct locations of their allotments and the corners and lines thereof.

ARTICLE V.

It is further stipulated and agreed that the lands by this agreement ceded, shall not be opened for public settlement until trust patents for the allotted lands shall have been duly issued and recorded, and the first payment shall have been made to said Indians.

ARTICLE VI.

It is further stipulated and agreed that any religious society or other organization now occupying under proper authority, for religious or educational work among the Indians, any of the lands ceded, shall have the right for two years from the date of the ratification of this agreement, within which to purchase the land so occupied, at the rate of three dollars per acre, the same to be conveyed to such society or organization by patent, in the usual form.

ARTICLE VII.

It is further stipulated and agreed that all allotments made to members of the tribe who have died since the same were made, or may die before the ratification of this agreement, shall be confirmed, and trust patents issued in the names of such allottees, respectively.

ARTICLE VIII.

It is further stipulated and agreed that the first per capita payment, provided for in Article VIII of this agreement, shall be made to those members of the Nez Perve tribe whose names appear on the schedule of al-

lotments made by Special Agent Fletcher, and to such as may be born to them before the ratification of this agreement: *Provided*, That should it be found that any member of the tribe has been omitted from said schedule, such member shall share in the said payment, and shall be given an allotment, and each subsequent payment shall be made to those who receive the preceding payment and those born thereafter: *Provided*, That not more than one payment shall be made on account of a deceased member.

ARTICLE IX.

It is further agreed that the lands by this agreement ceded, those retained, and those allotted to the said Nez Perce Indians shall be subject, for a period of twenty-five years, to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country, and that the Nez Perce Indian allottees, whether under the care of an Indian agent or not, shall, for a like period, be subject to all the laws of the United States prohibiting the sale or other disposition of intoxicants to Indians.

ARTICLE X.

Representation having been made by the Indians in council that several members of the Nez Perce tribe, to the number of about fifty, as per list hereto attached, served the United States under General O. O. Howard, in the late war with Joseph's Band of said tribe, as scouts, couriers, and messengers, and that they have received no pay therefor; it is agreed that the United States, through its properly constituted authority, will carefully examine each of the cases herewith presented, and make such remuneration to each of said claimants as shall, upon such examination, be found to be due; not exceeding the sum of two dollars and fifty cents per day each, for the time actually engaged in such service; it being understood and agreed that the time of service of said claimants in no case exceeded sixty days. And it also

having been made to appear that Abraham Brooks, a member of the Nez Perce tribe of Indians, was engaged in the service of the United States in the late war with Joseph's Band of Nez Perce, and it also appearing that the said Abraham Brooks was wounded in said service, and that by reason thereof he is now in failing health, and has been for several years; that he is now nearly blind in consequence thereof; it is agreed that an investigation of all the facts in the case shall be made by the proper authorities of the United States, as early as practicable, and that if found substantially as herein represented, or if found worthy under the law in such cases provided, he shall be allowed and paid by the United States a pension adequate to the service and disability.

ARTICLE XI.

The existing provisions of all former treaties with said Nez Perce Indians not inconsistent with the provisions of this agreement are hereby continued in full force and effect.

ARTICLE XII.

This agreement shall not take effect and be in force until ratified by the Congress of the United States.

In witness whereof the said Robert Schleicher, James F. Allen, and Cyrus Beede, on the part of the United States, and the principal men and other male adults of the Nez Perce tribe of Indians, have hereunto set their hands.

Concluded at the Nez Perce Agency, this first day of May, anno domini eighteen hundred and ninety-three.

ROBERT SCHLEICHER,
JAMES F. ALLEN,
CYRUS BEEDE,
A. B. LAWYER; and others.

Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the said agreement be, and the same hereby is, accepted, ratified, and confirmed.

That for the purpose of carrying the provisions of this Act into effect there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of one million six hundred and sixty-eight thousand six hundred and twenty-two dollars, of which amount the sum of one million dollars shall be placed to the credit of "the Nez Perce Indians of Idaho" in the Treasury of the United States, and shall bear interest at the rate of five per centum per annum. Said sum of one million six hundred and sixty-eight thousand six hundred and twenty-two dollars, together with the interest on said sum of one million dollars, shall be paid to said Indians, or expended for their benefit, as provided in articles two, three, four, and eight of said agreement; "out of which sum the Secretary of the Interior shall pay to the heirs, administrators, or legal representatives of William G. Langford, deceased, the sum of twenty thousand dollars, upon a release and relinquishment to the United States by said heirs, administrators, or legal representatives of all right, title, interest, or claim, either legal or equitable, in and to the tract of land described in article two of said agreement as therein provided: *Provided*, That none of the money agreed to be paid said Indians, nor any of the interest thereon, shall be, or become, liable to the payment of any judgment or claim for depredations committed by said tribe or any member thereof before the date of said agreement.

That immediately after the issuance and receipt by the Indians of trust patents for the allotted lands, as provided for in said agreement, the lands so ceded, sold, relinquished, and conveyed to the United States shall be

opened to settlement by proclamation of the President, and shall be subject to disposal only under the homestead, town site, stone and timber, and mining laws of the United States, excepting the sixteenth and thirty-sixth sections of each Congressional township, which shall be reserved for common-school purposes and be subject to the laws of Idaho: *Provided*, That each settler on said lands shall, before making final proof and receiving a certificate of entry, pay to the United States for the lands so taken by him, in addition to the fees provided by law, the sum of three dollars and seventy-five cents per acre for agricultural lands, one-half of which shall be paid within three years from the date of original entry; and the sum of five dollars per acre for stone, timber, and mineral lands, subject to the regulations prescribed by existing laws; but the rights of honorably discharged Union soldiers and sailors, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes of the United States, shall not be abridged except as to the sum to be paid as aforesaid.

That the Commissioner of Indian Affairs be, and he hereby is, authorized to employ a competent surveyor for a period not exceeding two years, at a compensation not exceeding one thousand two hundred dollars per annum, for the purposes stipulated in article four of said agreement, and he is also authorized to purchase two portable sawmills, as provided in article four.

That the Secretary of the Interior is hereby authorized to examine the claim of those Indians who served the United States under General O. O. Howard in the late war with Joseph's band of said tribe as scouts, couriers, and messengers, referred to in article ten of said agreement, and also as to the claim of Abraham Brooks, mentioned in said article, and report his findings and recommendations to Congress.

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No. 70-300

In the Supreme Court of the United States

OCTOBER TERM, 1971

NEZ PERCE TRIBE OF INDIANS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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SHIRO KASHIWA,
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Claims (Pet. App. A 1a–13a) is not yet reported. The opinion of the Indian Claims Commission (Pet. App. B 14a–33a), rendered on remand from the Court of Claims, 176 Ct. Cl. 815, certiorari denied, 386 U.S. 984, after reversal of the Commission's earlier decision, 13 Ind. Cl. Comm. 184, is reported at 22 Ind. Cl. Comm. 53.

JURISDICTION

The judgment of the Court of Claims was entered on March 19, 1971. The petition for a writ of certiorari was filed on June 17, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1255. See Sec-

438-720—71

tion 20(c) of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 25 U.S.C. 70s(c).

QUESTION PRESENTED

Whether petitioner is entitled to the payment of interest on the amount awarded to it by the Indian Claims Commission as additional compensation for lands ceded to the United States by an 1894 agreement.

STATUTE INVOLVED

Section 2 of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 1050, 25 U.S.C. 70a, provides in part:

> The Commission shall hear and determine the following claims against the United States * * * (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity * * *.

STATEMENT

On December 4, 1957, the Nez Perce Tribe filed a petition with the Indian Claims Commission to recover additional consideration for the 549,559 acres of land in Northern Idaho that it had ceded to the United States by the Agreement of May 1, 1893, approved and ratified by the Act of August 15, 1894, 28 Stat. 286, 326–332, 1 Kappler 536. The Tribe claimed that the amount paid pursuant to the Agreement was "unconscionable". See Section 2, Indian

Claims Commission Act, 25 U.S.C. 70a. Article III of the Agreement (Pet. App. D 52a) provided that, in consideration of the lands ceded, the United States would pay to the Nez Perce Indians the sum of $1,626,222; of this, $626,222 was to be paid to the Indians "as soon as practicable after the ratification of this agreement," and the balance of $1,000,000 was to be deposited in the Treasury of the United States to the credit of the Nez Perce "and shall bear interest at the rate of five per centum per annum." The sum of $50,000 was to be paid out to the Indians per capita at the expiration of the first year and, semi-annually thereafter, $150,000 "with the interest on the unexpended portion of the fund of one million dollars until the entire amount shall have been paid * * *." Under the terms of the Agreement, the compensation paid totalled $1,634,664, or $2.97 per acre. 13 Ind. Cl. Comm. 184, 185. The terms of the Agreement were carried out. The Court of Claims and the Commission agreed that there had been no fraud, duress or unfair or dishonorable dealings in connection with its negotiation (Pet. App. C 36a).

In its first decision, the Commission dismissed the petition, finding that with respect to the 549,559 acres of ceded land "the fair market value could not have exceeded $4.00 per acre." 13 Ind. Cl. Comm. at 236; cf. 176 Ct. Cl. 815, 819 (Pet. App. C 35a). On appeal, the Court of Claims ordered the case remanded to the Commission for further consideration of the "value" question; however, the court rejected the

Tribe's contention that interest should be awarded on whatever sum the Commission might determine the proper value to be (Pet. App. C 47a–48a). This Court denied the Tribe's petition for a writ of certiorari. 386 U.S. 984.

Upon remand, the Commission raised the "value" per acre from $4 to $5.50 (Pet. App. B 16a–17a) and, disagreeing with the Court of Claims, held that the Tribe was entitled to interest. Accordingly, the Commission awarded additional consideration in the amount of $1,387,911 and interest on that sum at 5 percent from August 15, 1894, to the date of payment (Pet. App. B 27a). The Commission calculated the interest through the date of judgment as $5,222,015.14.[1] Two commissioners dissented on the interest question (Pet. App. B 28a–33a).

On appeal by the government, the Court of Claims reversed the Commission's judgment insofar as it granted interest on the added consideration (Pet. App. A 1a).

ARGUMENT

The decision of the Court of Claims that the Tribe is not entitled to interest on the additional consideration awarded by the Commission is correct. This Court has consistently held that the United States is not liable for interest on claims against it, unless Congress expressly directs otherwise. See *United States* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585; *United States* v. *N.Y. Rayon Co.*, 329 U.S. 654; *United*

[1] This order was not included in the Appendix to petitioner's brief. It is included as an appendix to this brief, *infra*, pp. 1a–3a.

States v. *Goltra,* 312 U.S. 203. As the Court pointed out in *Peoria Tribe* v. *United States,* 390 U.S. 468, 470, this general rule "has been held to be fully applicable to the claims of Indian tribes." See *United States* v. *Alcea Band of Tillamooks,* 341 U.S. 48.

In prior cases involving an award based on the "unconscionable consideration" provision of Section 2 of the Indian Claims Commission Act, 25 U.S.C. 70a, the Court of Claims has held, as it did in this case, that the United States is not liable for interest on the award. See *Osage Nation* v. *United States,* 119 Ct. Cl. 592, 97 F. Supp. 381, certiorari denied, 342 U.S. 896; *Kiowa, Comanche and Apache Tribes* v. *United States,* 143 Ct. Cl. 534, 543–544, 163 F. Supp. 603, 609–610.

Petitioner contends, however, that the decision of this Court in *Peoria Tribe* v. *United States, supra,* dictates a contrary result. In *Peoria,* the treaty required that the lands there involved "be sold at public auction by the United States for the Tribe's benefit" and further provided that since the annual receipts could not be ascertained, the President and the tribe were to determine "how much of the net proceeds of said sales shall be paid them, and how much shall be invested in safe and profitable stocks, the interest to be annually paid to them, or expended for their benefit and improvement." 390 U.S. at 469. But the lands were not sold at public auction; instead, they were sold at private sales at appraised prices lower than would have prevailed at public auction. 390 U.S. at 470. The

Court held the United States liable for interest on the difference between the amount realized on the private sales and the amount that would have been realized had the land been sold at public auction as the treaty required. In so holding, the Court said in the clearest terms that it was not departing from the general rule that the United States is not liable for interest on claims against it (390 U.S. at 470–471):

> But this is not a case where the Court is asked to exercise "the power to award interest against the United States," *United States* v. *N.Y. Rayon Importing Co.*, 329 U.S. 654, 663. The issue, rather, concerns the measure of damages for the treaty's violation in the light of the Government's obligations under that treaty.

In other words, since the amount that would have been realized if the sales had been at public auction would have been placed in a separate fund, and since, under the terms of the treaty, the United States was required to pay interest on this, the proper measure of damages for breach of the treaty included interest on the amount awarded.

That is not the situation in this case. Here, the treaty, which the United States complied with, required the government to pay a fixed sum of $1,626,222, of which $1,000,000 was to be deposited in the Treasury to draw interest at 5 percent (Article III, Pet. App. D 52a). As the Court of Claims pointed out in its earlier decision (Pet. App. C 48a):

> * * * In determining whether the Agreement should be read so as to give appellant interest on the difference between the price paid and the

> fair market value, it is not enough for us to be able to say that *probably* a large payment would have been put into the trust. Article III did not make the trust open-ended. It was to receive "the remainder" of a specific sum. What would have happened had the sum been larger it is impossible for us to say. This is not a case like the *Pawnee Tribe* v. *United States*, 56 Ct. Cl. 1, 15 (1920), in which this Court awarded interest on an amount which the agreement specified but which the United States had for some unknown reason never paid. 27 Stat. 612, 644. The Agreement here specified a sum to bear interest, and that sum apparently was paid and did bear interest; the sum claimed here is over and above the amount specified in the Agreement. In short, the Agreement has reference only to the amount that was actually agreed upon and gives no warrant for reading in a requirement that any sum determined in the future to be the fair market value should bear interest.

Since this is not a case involving the proper measure of damages for breach of a treaty and since, in any event, the terms of the treaty provide only for interest on a specified sum, which has been paid by the United States, the Court of Claims correctly ruled that the Tribe was not entitled to interest on the additional compensation awarded, in the absence of an express statutory provision waiving the established rule that precludes such recovery. See *United States* v. *N.Y. Rayon Co.*, 329 U.S. 654, 659.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
SHIRO KASHIWA,
Assistant Attorney General.
RALPH A. BARNEY,
RAYMOND N. ZAGONE,
Attorneys.

JULY 1971.

APPENDIX

Before the Indian Claims Commission

Docket No. 175–B

THE NEZ PERCE TRIBE OF INDIANS, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

Order Amending Findings of Fact and Entering Conclusions of Law

Upon its own motion and in compliance with the decision of the Court of Claims in the subject case, being Appeal No. 5–64, decided July 15, 1966, 176 Ct. Cl. 815, *cert denied* 386 U.S. 984 (1967) and for the reasons set forth in the opinion this date filed herein, the Commission orders:

(1) That Finding of Fact No. 26, entered on April 7, 1964, be stricken and there be set forth in lieu thereof the following:

> 26. Based on all the evidence of record in this case and upon the findings of fact entered herein, the Commission finds that the subject area had a fair market value, as of August 15, 1894, of $3,022,575.00, or an average per acre value of approximately $5.50.

(2) That Finding of Fact No. 27, entered on April 7, 1964, be stricken.

It is further ordered, that all other findings of fact entered by this Commission on April 7, 1964, are re-entered and affirmed.

It is further ordered, that the following conclusions of Law be entered:

Conclusions of Law

The consideration paid by the defendant for the cession was $1,634,664.00 or an average of about $2.97 per acre. This leaves a difference of $1,387,911.00 in the fair market value of the tract and the amount paid for the cession. Accordingly, the lands were worth about 80% more than the consideration which was paid the plaintiff. The Commission concludes that the consideration of $1,634,664.00 paid to the plaintiff for the cession of its lands having a fair market value of $3,022,575.00 was so grossly inadequate as to make the consideration unconscionable.

Under the provisions of Article 3 of the Nez Perce Agreement (28 Stat. 286, 326–332, 1 Kappler 536), the plaintiff was entitled to have interest on that portion of the consideration which was not immediately paid. The Commission concludes that the plaintiff is likewise entitled to have interest on that portion of the revised treaty consideration which it never received. Acordingly, plaintiff is entitled to an additional amount required by Article 3 of the agreement, measured by simple interest at the rate of 5% per annum on $1,387,911.00 from the date of the ratification of the agreement, August 15, 1894, to the date of payment of said $1,387,911.00.

Since the parties have agreed that there are no gratuitous offsets to be claimed in this case, the plaintiff is entitled to entry of a final award.

The interest through the date of this judgment amounts to $5,222,015.14. Accordingly, the plaintiff is entitled to an award in the amount of $6,609,926.14 plus simple interest at the rate of 5% per annum on the principal sum of $1,387,911.00 from November 15, 1969, to the date of payment of said principal sum.

Dated at Washington, D.C., this 14th day of November, 1969.

MARGARET H. PIERCE,
Commissioner.
JOHN T. VANCE,
Commissioner.
BRANTLEY BLUE,
Commissioner.

Concurring except as to award of interest:
JEROME K. KUYKENDALL,
Chairman.
RICHARD W. YARBOROUGH,
Commissioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-300

NEZ PERCE TRIBE OF INDIANS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF OF PETITIONER TO BRIEF IN OPPOSITION OF UNITED STATES

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REPLY BRIEF OF PETITIONER TO BRIEF IN OPPOSITION OF UNITED STATES

Petitioner agrees with respondent that the United States generally is not liable for interest on claims against it, unless the Constitution or Congress expressly directs otherwise, and that this general rule has been held to be applicable to the claims of Indian tribes (Br..4-5).

The sole question here is whether or not Congress authorized the payment of interest in this case. Respondent contends a lack of statutory authority for the payment of interest and cites *Peoria Tribe* v. *United States*, 390 U.S. 468, as a case embodying application of the principle, with a result favorable to the Indians. Respondent, however, fails to recognize that the Indian Claims Commission Act is as much the statutory basis for the award of interest made by the Indian Claims Commission to the Nez Perce Indians as was their 1894 agreement with the United States.

The pertinent provisions of that Act read:

> "The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: . . . (3) *claims which would result if the* treaties, contracts, and *agreements between the claimant and the United States were revised on the ground of* fraud, duress, *unconscionable consideration,* mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity. . . ." (Act of August 13, 1946, 60 Stat. 1049; 25 U.S.C. § 70a; emphasis added.)

The power granted to the Commission by that language is unlimited in rendering a judgment in a claim based upon a Commission "revision" of the basic agreement. There is nothing that even hints an award by the Commission based on a revision cannot include a sum of money reflecting the Commission's determination of what the award should be in light of its revision, whether that sum is denominated interest or some other term.

The only limitation on the quantum of relief the Commission may award is found in the third paragraph of § 70a of 25 U.S.C., which provides that in determining relief, the Commission shall make certain appropriate deductions for payments made by the United States on the claim and for all other offsets, counterclaims and demands which would be allowable in a suit brought in the Court of Claims. In addition, the Commission may consider gratuities expended for the benefit of the claimant, and if it finds that the nature of the claim and the entire course of dealings and accounts between the United States and the claimants in good conscience warrants said action, it may set off all or a part of such expenditures against any award made on the claim (25 U.S.C. § 70a).

The Commission was established by Congress to right the historical wrongs perpetuated against the Indians in the taking of their property. Its discretion under § 70a to revise agreements is unfettered. Congress lodged the power with the Commission. Should the Commission conclude that on the facts a revision of an agreement should be made, its decision is not subject to review by any court. Review by the Court of Claims may be had of the factual determination underlying the Commission's exercise of its discretion, but absent a reversal of the factual holding or legal conclusions which support the Commission's discretionary action, that action must be affirmed.[1]

The pertinent review provisions read:

> ". . . On said appeal the Court [of Claims] shall determine whether the findings of fact of the Commission are supported by substantial evidence, in which event they shall be conclusive, and also whether the conclusions of law, including any conclusions respecting 'fair and honorable dealings', where applicable, stated by the Commission as a basis for its final determination, are valid and supported by the Commission's findings of fact. In making the foregoing determinations, the Court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. The Court may at any time remand the cause to the Commission for such further proceedings as it may direct, not inconsistent with the foregoing provisions of this section. . . .
>
> "(c) Determinations of questions of law by the Court of Claims under this section shall be subject to review by the Supreme Court of the United States in the manner prescribed by section 288 of Title 28." (25 U.S.C. § 70s.)

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[1] This is the only case in which the Commission has exercised its discretion in this manner since the Commission was created by Congress in 1946.

The Commission, having reviewed the evidence and having determined that the Nez Perce Tribe received an unconscionable consideration for its land under the 1894 agreement, exercised its discretion to base an award upon that agreement, as if the agreement were revised, with the revision to take into account the nature of the original terms of the agreement, with the award to reflect that fact by including additional compensation, measured by an interest factor.

CONCLUSION

The 1894 agreement expressly provided for interest on the stated consideration. Congress granted to the Commission the power to enter an award based upon a "revision" of any agreement it found unconscionable. The Commission found the consideration paid unconscionable and it fashioned a judgment for the claimant based upon the authority Congress gave to it to make awards based on such revisions. Congress did not give the Court of Claims a review power over the exercise of the Commission's discretion in so fashioning awards. Therefore, the award is not one of interest against the United States without the consent of Congress, but an award based upon the statutory power of the Commission to exercise its discretion to enter a judgment as if an agreement were revised.

Certiorari should be granted and the judgment of the Court of Claims reversed.

Respectfully submitted,

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